

**“TRAFFICKING IN CULTURAL PROPERTY”**

**GUIDELINES**

**for crime prevention and criminal justice responses  
in relation with trafficking and other illicit behaviours in cultural property**

**Advanced Unedited Version**

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## Introduction

These Guidelines have been produced pursuant to the Economic and Social Council resolution 2011/42 entitled “Strengthening crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking”. In that resolution, the Council requested the United Nations Office on Drugs and Crime to further explore the development of specific guidelines for crime prevention and criminal justice responses with respect to trafficking in cultural property. The Guidelines are expected to assist Member States in identifying crime prevention and criminal justice responses to trafficking in cultural property and implementing them at the national and international level.

Pursuant to this mandate, UNODC commissioned extensive research and analysis leading to the preparation of the guidelines on crime prevention and criminal justice responses to trafficking in cultural property. A first draft of the Guidelines was reviewed at an informal expert group meeting, held from 21 to 23 November 2011 in Vienna. The experts provided valuable comments and advice on improving the Guidelines. The experts also provided cases and examples and shared their experiences, which were then taken into account in producing a second draft. The second draft was circulated to the experts for a second round of comments and their feedback was incorporated into the present document. The group of 20 experts from around the world who participated in the review of the guidelines, was composed of persons with expertise in various fields related to the subject-matter of the Guidelines and included lawyers, cultural heritage experts, law enforcement officers with expertise in protection of cultural property, academics, experts in international co-operation, customs officers, judicial officers, government policy makers and representatives of INTERPOL, UNESCO and UNIDROIT.

In the course of the preparation of the Guidelines, an analysis of the following of all major relevant international legal instruments was carried out: the UN Convention against Transnational Organized Crime, Palermo, 12-15 December 2000<sup>1</sup>; the UN Convention against Corruption, Merida, 31 October 2003<sup>2</sup>; the Convention for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, 14 May 1954<sup>3</sup>; the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999<sup>4</sup>; the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977<sup>5</sup>; the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970<sup>6</sup>; the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Rome, 24 June 1995<sup>7</sup>; and the UNESCO Convention on the Protection of the Underwater Cultural Heritage, Paris, 2 November 2001<sup>8</sup>.

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<sup>1</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574

<sup>2</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146

<sup>3</sup> United Nations, *Treaty Series*, vol. 249, No. 3511

<sup>4</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511

<sup>5</sup> United Nations, *Treaty Series*, vol. 1125, No. 17512

<sup>6</sup> United Nations, *Treaty Series*, vol. 823, No. 11806

<sup>7</sup> Available from [www.unidroit.org](http://www.unidroit.org)

<sup>8</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

Other important instruments and documents that have also been taken into consideration in drafting the Guidelines include the UN Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property, of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990<sup>9</sup>; the European Convention on Offences relating to Cultural Property, Delphi, 23 June 1985<sup>10</sup> and the Report on the meeting of the expert group on protection against trafficking in cultural property held in Vienna from 24 to 26 November 2009<sup>11</sup>.

The research included the review of the current practices and initiatives of several countries in tackling the problem of trafficking in cultural property, the challenges they encounter and how they have overcome such difficulties. It also examined available examples of best practices and actual cases, drawing on practical examples and other information provided by States parties.

The final document contains three chapters.

Chapter I concerns prevention strategies not involving criminal law measures, particularly instruments for information and data collection (Section I), the role of cultural institutions and the private sector (Section II), provisions and techniques to improve monitoring of the cultural property market, importations and exportations, and archaeological sites (Section III), and education and public awareness raising (Section IV).

Chapter II contains guidelines for criminal justice policies, with specific regard to the application of existing international instruments (Section I), the introduction and/or implementation of criminal and administrative offences (Section II), the nature and severity of sanctions that may be imposed (Section III), the introduction and/or implementation of corporate liability for offences against cultural property (Section IV), seizure and confiscation measures for combating trafficking in cultural property (Section V), and the improvement of the effective investigations, both national and across borders (Section VI).

Finally, Chapter III proposes guidelines detailing with measures for improving international cooperation, and particularly deals with questions related to jurisdiction (Section I), judicial cooperation in criminal matters (Section II), extradition (Section III), international seizure and confiscation (Section IV), police and investigative cooperation (Section V), and return, restitution and repatriation (Section VI).

It is hoped that national policy makers and legislators will use all or parts of the Guidelines to assist them in putting in place policies and laws that promote the protection of cultural property from trafficking and other forms illicit activity.

The Guidelines are written in the form of recommendations to States and cover a wide arena of possibilities. States may therefore adapt them as they deem necessary and taking into account what may be applicable at the national, regional and international level.

Vienna

April 2012

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<sup>9</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>10</sup> Council of Europe, *European Treaty Series*, No. 119

<sup>11</sup> UNODC/CCPCJ/EG1/2009/2

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## Chapter I. Prevention Strategies

### Section I. Information and data collection

**GUIDELINE 1.** *States should consider to establish and develop inventories of relevant cultural properties.*

⇒ see also *Guideline 2 on databases*

1.[RATIONALE:] The registration of a relevant cultural movable property in an inventory (with restricted access) is a useful measure in fighting the illicit art market and in preventing trafficking. Firstly, it can facilitate the identification of cultural objects by the authorities; secondly, it supports police and other control agencies in monitoring the art market, especially in tracing cultural objects back to trafficking or other illicit or doubtful provenance; finally it provides a sound basis for claims for restitution, return and repatriation.

[BACKGROUND:] The relevance of inventories in preventing the easy circulation of stolen or illicitly imported or exported cultural property is stressed by the main international conventions and documents:

a. article 5 and article 33, *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>12</sup>, enlist the arrangement of inventories at first place amongst the preparatory measures that each State should take, in time of peace, in order to safeguard cultural property against the foreseeable effects of an armed conflict;

b. article 5 and article 7, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>13</sup>;

c. article 3, *Convention on Stolen or Illegally Exported Cultural Objects*<sup>14</sup>;

d. some regional instruments, such as article 4, *European Convention on the Protection of the Archaeological Heritage*<sup>15</sup>;

e. several UNODC documents: see for instance the thematic discussion on protection against illicit trafficking in cultural property, held at the nineteenth session of UN Commission on Crime Prevention and Criminal Justice, when the "establishment of national inventories, lists of cultural objects and, if possible, a photographic archive of such objects and the establishment of a national database, with the possibility of linking national databases to each other and to international databases, in particular the INTERPOL database", was included amongst the relevant preventive measures that States should take in order to protect cultural property<sup>16</sup>;

f. the ICOM *Red List*<sup>17</sup>, which classifies the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported.

<sup>12</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>13</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>14</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>15</sup> Council of Europe, *European Treaty Series*, No. 66.

<sup>16</sup> See Economic and Social Council resolutions 2008/23, 2010/19 and 2011/42; for more information on the thematic discussion on protection against illicit trafficking in cultural property see E/2010/30, chap. II; see also UNODC/CCPCJ/EG.1/2009/2 and UNODC/CCPCJ/EG.1/2009/CRP.1; see also United Nations Educational, Scientific and Cultural Organization, *Legal and Practical Measures against Illicit Trafficking in Cultural Property: UNESCO Handbook*, (Paris, International Standards Section, Division of Cultural Heritage, 2006), pp. 5-7; see also the Charter of Courmayeur, adopted during the International Workshop on the Protection of Artistic and Cultural Patrimony, Courmayeur, Italy, 25-27 June 1992.

<sup>17</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic.html>.

[CONTENT:]

2. States should consider establishing or developing (where they exist, such as, for example, in Armenia, Australia, Bulgaria, Belarus, Croatia, Egypt, Switzerland and other countries)<sup>18</sup> inventories of relevant movable cultural properties. Such inventories should be made accessible to all public authorities, and especially by administrations, police and other enforcement agencies, as well as researchers. Under strict conditions, States could consider making the access to inventories (or to some restricted areas of them) available to private individuals who have been previously registered.

3. The inventories should be comprehensive and coordinated, and should include all relevant publicly owned cultural properties. States could also consider including in the inventories, relevant private collections and properties (for example ecclesiastical cultural properties and ancient libraries). In this case, an authorization by the owner should be obtained and incentives may be granted (e.g. fiscal incentives).

4. States should consider adopting a common international standard for inventorying cultural property, as a means of facilitating the exchange and circulation of information. The “Object-ID” standard (developed by the Getty Information Institute and recognized by both UNESCO and the International Council of Museums) can be used as a minimum reference point, as it includes photographs of the work of art, and brief description as well as a classification of the type of object, the materials and the techniques used to create it, etc..

5. The entry of an object of art in an inventory could be also include an annotation by its owner and/or holder. Archaeological objects entered in an inventory as soon as it is found, and even before the conclusion of the identification procedures<sup>19</sup>.

6. States may consider: (i) to translate national inventories into digital databases, so as to facilitate their access and cross-checking; (ii) to set up a unified national inventory (including the consolidation of existing registers and catalogues), or to interconnect existing inventories – both public and private – in a coordinated network of national databases; (iii) to establish a common infrastructure, which would allow access through a single online portal to all national inventories of cultural property<sup>20</sup>.

**GUIDELINE 2. States should consider establishing and develop databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property.**

⇒ see also *Guideline 1 on inventories*

7. [RATIONALE:] Enforcement authorities should establish and develop databases of all criminal offences and administrative violations against cultural property in every country, by detailing objects and people engaged in illegal activities. Great advantages would arise

<sup>18</sup> See the reports of the Secretary-General on *protection against trafficking in cultural property* (E/CN.15/2006/14 and E/CN.15/2010/4); see also reports of Member States on measures they have adopted to implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO documents 167 EX/20 and 28 C/35).

<sup>19</sup> See Economic and Social Council resolutions 2008/23; see also the reports of the Commission on Crime Prevention and Criminal Justice (E/2010/30 and E/2011/30); see also the report on the meeting of the expert group on protection against trafficking in cultural property held in Vienna from 24 to 26 November 2009 (UNODC/CCPCJ/EG1/2009/2); see also *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, pp. 5-7; see also the Charter of Courmayeur.

<sup>20</sup> See also UNODC/CCPCJ/EG1/2009/2.

from the creation of these databases: (i) *the art and antiquities dealers, as well as museums and other professionals, may be required to consult the databases before engaging in any professional dealings regarding any cultural property*; (ii) *police and custom authorities could use them to identify the proceeds of a crime (for example while trying to be sent across borders with false documents, or being presented in on-line auctions, or appearing in a collection)*<sup>21</sup>; *prosecutors and judges could rely on them in collecting evidence on the illicit origin of a cultural property. Moreover, the diffusion of this system will lead to a greater interconnection amongst national and international databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated and, more generally, illicitly dealt in cultural property.*

[BACKGROUND:] Currently, it's possible to list the following existing instruments related to the suggested establishment of the above mentioned databases:

a. First of all, INTERPOL provides the fundamental *Stolen Works of Art Database*, which is accessible to all INTERPOL member Countries<sup>22</sup>; until 2009 INTERPOL periodically issued a widely available *Stolen Works of Art CD-ROM* as well as posters showing the most sought after stolen works of art. The modernization of INTERPOL's *Stolen Works of Art Database* is currently on the way. This is being done under a project codenamed PSYCHE (*Protection System for Cultural Heritage*), in collaboration with the Italian Carabinieri Specialized Unit for the protection of cultural heritage and the main objectives are.

- to enable direct data integration by member countries using a formatted message system;
- to enact direct data transfer from Italy's database Leonardo into INTERPOL's database;
- to simplify queries with the use of an image similarity software tool;
- to provide training (e-learning module and training sessions) to member countries.

b. In the past, ICOM provided the *One-Hundred Missing Objects Series*<sup>23</sup>, which enlisted objects that had been stolen and whose disappearance had been reported to the police. It also integrated the *Red List* that more generally classifies the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported.

c. Article 19.4, *Convention on the Protection of the Underwater Cultural Heritage*<sup>24</sup>, binds States parties to "take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated contrary to [the] Convention [itself] or otherwise in violation of international law".

d. Article 2, (b), *UN Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>25</sup>, refers to the creation and implementation of an international database on stolen movable cultural property.

e. The UNODC Expert group *on protection against trafficking in cultural property*, held in Vienna from 24 to 26 November 2009<sup>26</sup>, recommended the creation and implementation of an international database on stolen movable cultural property and the disposition and implementation of state digital databases.

f. Recommendation 30 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>27</sup>, state that EU Member States should encourage

<sup>21</sup> See also article 5, subparagraph (g), of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, No. 11806).

<sup>22</sup> See [www.interpol.int/Public/WorkOfArt/Default.asp](http://www.interpol.int/Public/WorkOfArt/Default.asp).

<sup>23</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic.html>.

<sup>24</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>25</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>26</sup> UNODC/CCPCJ/EG1/2009/2.

<sup>27</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

the use of all the available databases for stolen objects before proceeding with acquisition of an object. The INTERPOL database<sup>28</sup> is particularly recommended as a reliable source of information and Member States shall put special effort to correctly incorporate updated information.

g. The ALR (*Art Loss Register*<sup>29</sup>) is a private-for-profit organization, with a section devoted to preventive registration of cultural properties (i.e., a “pre-loss database”). It is accessible by public agencies (law enforcement agencies, museums, etc.), private entities (collectors, auction houses, art dealers, etc.) and individuals. Even if some difficulties could arise from the nature of this organization, the database in itself could have the potential to provide an alternative approach to exclusive data collection by INTERPOL and public agencies, especially in countries where public control agencies do not have the resources or expertise (particularly in the international art market) to carry such work out.

h. Some States already possess official databases on stolen, missing or illicitly exported cultural property. Italy, for example, has been implementing since 1980, the *Banca dati dei beni culturali illecitamente sottratti* (Data bank of illicitly stolen cultural properties, a.k.a. *Banca dati Leonardo*), run by a police force, the *Comando Carabinieri per la Tutela del Patrimonio Culturale* (Carabinieri Command for the Cultural Heritage Protection), which presently collects all reports (with the related, including photographic, documentation, according to the “Object-ID” standard) coming from the various national police agencies, custom authorities, Ministry of Cultural Heritage and Monuments and Fine Arts Departments, as well as from INTERPOL. It is also connected to the digital inventory of Italian ecclesiastical cultural properties (*Servizio informatico della Conferenza Episcopale Italiana – Sistema Beni Culturali*), run by *Conferenza Episcopale Italiana* (Italian Bishops’ Council). One of the oldest databases on stolen works of art is the “NNSACH”, run by the Federal Criminal Office of Germany (*Bundeskriminalamt Wiesbaden*). Another example of such a database is the one developed by France, called “TREIMA” (*Thésaurus de Recherche Electronique et d’Imagerie en Matière Artistique*, Thesaurus of electronic research and images in artistic matters), run by the *Office Central de lutte contre le trafic des Biens Culturels* (OCBC, Central office for combating trafficking in cultural property), within the French Home Office (*Ministère de l’Intérieur*)<sup>30</sup>.

8. [CONTENT:] In order to develop the system, States should consider adopting a series of necessary measures. First of all, every State should create a national database on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property. Where already existing, the States should expand the national database, providing constant and prompt updating. In addition, all States should contribute to the INTERPOL’s *Stolen Works of Art Database* (which is the only existing international public database), in order to provide immediate, concomitant insertion of a trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property both in its national database, and in the international ones. Publishing international bulletins with the specifications of such cultural property may be also considered.

9. The databases should be set up in such a way that ensures that the cultural property could be, as far as possible, clearly identifiable, including by photographic representation. Where the object was never registered (for example, in case of newly excavated or looted archaeological finds), any available information should be inserted in the database. In order to ensure the insertion of such cultural property, States should take all other necessary measures<sup>31</sup>.

10. These databases should be available to the public with a system of registration or secured access for professionals and private individuals. States should consider making all existing databases more largely and freely accessible, not only to law-enforcement agencies,

<sup>28</sup> See [www.interpol.int/Public/WorkOfArt/Default.asp](http://www.interpol.int/Public/WorkOfArt/Default.asp).

<sup>29</sup> See [www.artloss.com/](http://www.artloss.com/).

<sup>30</sup> See [www.interieur.gouv.fr/sections/a\\_1\\_interieur/la\\_police\\_nationale/organisation/dcpj/trafic-biens-culturels](http://www.interieur.gouv.fr/sections/a_1_interieur/la_police_nationale/organisation/dcpj/trafic-biens-culturels).

<sup>31</sup> See also UNODC/CCPCJ/EG1/2009/2: similar recommendations are also contained in the Charter of Courmayeur.

but also to museums and cultural institutions, art and antiquity market professionals and the general public<sup>32</sup>.

11. To consult such databases before engaging in any professional activity could be considered as necessary to assess a good faith defence for any person caught in possession of a trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property. States may also consider, when the database is publicly accessible (at least with a system of registrations and passwords, such as the INTERPOL's *Stolen Works of Art Database*), to impose an obligation of consultation by art and antiques dealers, as well as by museums' and collections' functionaries appointed to acquisitions.

12. States may consider taking measures in order to ensure the immediate insertion of a cultural property in the national database, whenever a notice of an offence involving a cultural property is brought to the attention of its authorities. States may consider shaping their national databases after the existing international databases (particularly, after the INTERPOL's *Stolen Works of Art Database*), in order to facilitate information exchange and circulation at the international level.

13. States should transfuse the whole content of their national databases in the INTERPOL's *Stolen Works of Art Database*. States may also take measures (including through implementation of technologies currently in use) to ensure the automatic transmission to international databases of any inscription newly added to their national ones. They may also consider directly linking their national databases to the international ones, in order to create a larger, more efficient and immediately accessible international network of databases.

14. In order to achieve international integration, States may also consider interconnecting their national databases in a unified network of databases to which each national competent authority should have access.

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<sup>32</sup> See also the conclusions of the INTERPOL's Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, France, 17-19 June 2008..

**GUIDELINE 3. States should consider introducing or improving statistics on import and export of cultural property, as well as on administrative and criminal offences against cultural property.**

⇒ see also *Section III on monitoring*

15. [RATIONALE:] States should collect specific and reliable empirical data in order to provide statistics related to both licit and illicit activities concerning cultural property, as a tool for monitoring the art and antiquities market.

16. The proposed collection of official statistical data can have a variety of positive effects.

Firstly, a systematic collection of data on the flow of imported and exported cultural objects, their provenance and destination, their characteristics and the type of dealers can provide valuable information on trends and assist proactive investigations by police and custom authorities.

17. Secondly, it can greatly enhance the criminological knowledge of the phenomenon of illicit dealings in cultural property, by providing specific and disaggregated statistics on criminal offences against cultural property. In particular, it can show trends in reporting and discovery, in prosecution, sentencing, and recovery of the assets, as well as in numbers and characteristics of people reported, arrested, prosecuted and sentenced, and in the typology and extent of sanctions imposed.

18. Thirdly, it should be supported by the development of specific criminological research, which includes other instruments other than official statistics (such as victimization surveys, self-assessment reports, case studies, etc.) on crimes against cultural property. This will reduce the number of “dark figure” (i.e. offences which escape detection by authorities), which is especially high, due to the “porosity” between the legal and illegal market in art and antiquities, the frequent transnational character of the offences, the prevalence of the involvement of professionals in such crimes and the risk of lack of registration or inventorying.

19. Lastly, it will support the national legislators, when planning policies of prevention or testing the efficacy and effectiveness of already existing laws and regulations.

[BACKGROUND:] The collection of disaggregated criminal statistics is already taken into count by UNODC as a relevant element in preventing crime:

a. the collection, analysis and sharing of statistics are largely promoted by UNODC in relation to many complex criminal phenomena (such as corruption<sup>33</sup> and organized crime<sup>34</sup>);

b. the UN *Survey on Crime Trends* has recently been upgraded with the insertion of a section dedicated to illicit trafficking in cultural property, and States shall be able to comply with the periodic UNODC’s requests for data by providing statistics. In particular, UNODC included, in 2009, a module on trafficking in cultural property in the Eleventh Survey, on a pilot basis. The module covered police and court statistics on a number of crimes, including trafficking (defined by the Survey as import, export or transport) of cultural property, theft of cultural property, possession/handling of cultural property and unlawful excavation of cultural property. National police bodies were asked to provide information on the number of

<sup>33</sup> See article 61 of the United Nations Convention against Corruption (United Nations, *Treaty Series*, vol. 2349, No. 42146), which also contains also a specific provision.

<sup>34</sup> See for example E/2010/30. The collection of affordable criminal statistics can be included among the instruments of analysis and monitoring of trends in organized crime, as well as policies and measures to fight it, which are referenced in article 28 of the United Nations Convention against Transnational Organized Crime (United Nations, *Treaty Series*, vol. 2225, No. 39574).

recorded offences and persons suspected of, arrested for or accused of those crimes. Courts were also asked to provide information on the number of persons tried and convicted for those crimes. Only 24 States entered data in the module on trafficking in cultural property. Responding States were more frequently able to provide police data (20 responses) than court data (12 responses). Only five States provided data on the number of offences involving unlawful excavation of cultural property;

c. UN and UNODC have taken into account the integration of official criminal statistics through victimization surveys on some relevant criminal phenomena in some recent documents<sup>35</sup>;

e. the UNODC Expert group *on protection against trafficking in cultural property*, held in Vienna from 24 to 26 November 2009<sup>36</sup>, "drew attention to the lack of data in the area of trafficking in cultural property. Emphasis was placed on the need to collect relevant data, especially by way of comparable statistics, to increase the responses from Member States and enhance coordination in international data collection exercises";

d. according to Recommendation 32 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>37</sup>, EU Member States and EU Commission shall create technical and financial means to establish a European Database/Platform focused on the legal circulation of cultural goods, as well as sustain the development of national databases related to the legal circulation of cultural goods (export licenses and other legal national certificates);

e. a set of national self-report studies was sponsored by NATO in 1988, through the *Advanced Research Workshop on self-report methodology*<sup>38</sup>;

f. some States have already established regular criminological surveys to integrate official criminal statistics: in the United States, for example, the *National Crime Victimization Survey* was begun in 1972, and is presently run by the Department of Justice.

20. [CONTENT:] Statistics should include both legal activities (import/export; selling/purchasing) and illicit ones (administrative and criminal offences against cultural property). States should consider adopting all necessary measures in order to collect regularly (at least on annual basis) the aforementioned data, so as to have comparable statistical series available.

21. The data should be as disaggregated as possible (e.g., persons involved shall be disaggregated by sex, age and, possibly, profession and presence or absence of previous records; offences shall be disaggregated by typology, location and, possibly, number of persons involved and typology of cultural property involved; etc.). For example, States may consider passing regulations whereby local police reporting systems have separate categories for art crimes.

22. States should pay special attention to the surveys on the involvement of organized crime in offences against cultural property, and support independent criminological research (e.g. by national research centres or universities, in partnership with other public and private cultural institutions) and other type of studies, such as victimization surveys, self-report studies, case studies, etc..

23. States may make use of their existing statistical services, or devote the task of collecting and analyzing the data to the Central National Authority created or identified

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<sup>35</sup> See Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World (A/CONF.213/18, chap. I, resolution 1); see also E/2010/30, chap. I, sect. A. and E/2011/30, chaps. V., sect. A. and VII. sect. A.

<sup>36</sup> UNODC/CCPCJ/EG1/2009/2.

<sup>37</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>38</sup> Organised by Prof. Malcolm W. Klein from the University of Southern California and the Research and Documentation Centre of the Dutch Ministry of Justice.

according to Guideline 4 (in cooperation with police, the judiciary and custom authorities). They may also consider some form of interaction and cooperation among these institutions.

**GUIDELINE 4. States should consider establishing a Central National Authority or to empower an existing Authority (and/or enact other mechanisms) for the protection of cultural property.**

24. [RATIONALE:] A Central National Authority, of each country, should be in charge of co-ordinating all the activities related to the prevention of trafficking in cultural objects and co-operate at the international level.

25. The necessity of a centralized coordination of prevention policies arises when considering that trafficking in cultural property and related offences are a complex phenomenon. This complexity is related to the fact that trafficking in cultural property involves national and transnational aspects, and entails public and private agents and institutions. Moreover, these illegal activities tend to hide themselves in a market of large dimensions and great complexity, often opaque and largely in need of monitoring, and impinge on a vast, often dispersed and always heterogeneous cultural heritage.

26. Furthermore, cooperation between law enforcement agencies and other competent authorities, on one side, and museums and other cultural institutions (private and public) and private operators in the art and antiques market, on the other, has to be very strong.

[BACKGROUND:] The setting up of specific national services or authorities charged with various tasks related to cultural property protection is envisaged in many existing international instruments:

a. article 5 and article 14 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>39</sup> refer to "one or more national services" charged with the aforementioned tasks;

b. article 22 of the *Convention on the Protection of the Underwater Cultural Heritage*<sup>40</sup> contains a similar provision;

c. article 5 of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>41</sup> refers, generically, to the "designation of competent authorities responsible for the safeguarding of cultural property";

d. amongst regional instruments, article 3 of the *Council Directive 93/7/EEC* of 15 March 1993 on *The return of cultural objects unlawfully removed from the territory of a Member State* states that "each Member State shall appoint one or more central authorities to carry out the tasks provided for" in the Directive;

e. the institution (or development) of central authorities, focused on the protection of cultural property, has been suggested also by the UNODC Expert group *on protection against trafficking in cultural property* held in Vienna from 24 to 26 November 2009<sup>42</sup>;

f. the UNODC Expert group *on protection against trafficking in cultural property*, in its 2009 *Report*, recommended to States to promote private-public partnerships, and more particularly to encourage institutions dealing with auctions, including through the Internet, to ascertain the true provenance of cultural objects to be auctioned, as well as, more generally, to promote cooperation between representatives of the public and private sectors (such as Internet providers) to track the internet sites dealing in cultural property;

<sup>39</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>40</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>41</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>42</sup> UNODC/CCPCJ/EG1/2009/2.

g. the UN has underlined on a number of occasions, the importance it is that museums, collectors and auction houses carry out preventive monitoring work on the art and antiquities market and, more generally, that public-private partnership are created and implemented in order to effectively protect cultural property<sup>43</sup>;

h. in the *Conclusions of the Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques* it was strongly recommended that UN member States conclude agreements with auction platforms in order to reduce illegal sales and to monitor this type of trade as effectively as possible<sup>44</sup>;

i. more generally, the UN Commission on Crime Prevention and Criminal Justice, as well as the *Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, recognized the primary importance of "strengthening public-private partnerships to counter crime in all its forms and manifestations"<sup>45</sup>;

j. several States have already experimented with agreements with private operators in order to improve market monitoring and investigations: for example, in October 2006 the British Museum and the Museums, Libraries and Archives Council stipulated a memorandum of understanding with a major online auction company, whereby the British Museum would monitor the company's website for items constituting potential treasure, question vendors and notify the Metropolitan Police's Art and Antiques Unit of any unreported items<sup>46</sup>.

27. [CONTENT:] States should establish a Central National Authority endowed with powers of coordination and/or regulation in matters related to the protection of cultural property. As an alternative, States may consider empowering already existing Authorities and/or to establish other equivalent mechanisms. This authority will be in charge of coordinating all the existing public actors engaged in preventing trafficking in cultural objects and/or managing all the relevant activities, and it will co-operate at the international level. With the aim of strengthening public-private partnerships, States may consider the involvement of private actors (such as museums, auctions houses, insurances, etc.) for specific activities on an ad hoc basis.

28. This authority will be responsible for either accomplishing or supervising the following activities: (i) inventorying of national cultural property; (ii) supporting criminological research and statistic data collection on the illicit market of cultural property; (iii) implementing specialized training programs for public and private actors in cultural institutions, art and antiquities market, police and customs authorities; (iv) developing and promoting codes of conduct for operators in cultural institutions as well as in the art and antiquities market; (v) supporting and coordinating market monitoring programs; (vi) promoting public campaigns to raise awareness and care for cultural heritage; (vii) sharing information and supporting international cooperation. Another relevant task should be the development of a public-private partnership in cultural property protection, by promoting and coordinating contacts, communications and exchanges amongst public and private cultural institutions, or their national associations, law-enforcement and other competent public agencies, internet providers, and national professional and professional associations of dealers in art and antiques and auctioneers.

29. States should ensure that the Central National Authority is endowed with the resources and the authority needed to effectively pursue its aims.

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<sup>43</sup> See CTOC/COP/2010/12\*, and E/CN.15/2010/6.

<sup>44</sup> See conclusions of the INTERPOL's Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, France, 17-19 June 2008.

<sup>45</sup> E/2010/30, resolution 19/1; and Salvador Declaration on Comprehensive Strategies for Global Challenges.

<sup>46</sup> E/CN.15/2010/4.

## Section II. The role of cultural institutions and private sector

### **GUIDELINE 5. States should consider encouraging cultural institutions to adopt codes of conduct and to disseminate best practices.**

30. [RATIONALE:] Cultural institutions (public and private museums, archives, collections), as well as other private actors (art dealers, auction houses, etc.) should adopt codes of conduct, with specific provisions on acquisition policies.

31. As is well known, licit and illicit trade in arts and antiques very often utilizes the same channels, giving rise to a vast “grey market”, in which the same dealers and intermediaries may handle perfectly legal goods and as well as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing ones. Therefore, auction houses, antiquarians and galleries can find themselves, sometimes knowingly, sometimes unknowingly (or negligently), dealing in illicitly sourced cultural properties. Close cooperation amongst private operators in the art and antiques market and law-enforcement agencies would therefore be of the uttermost importance in order to prevent trafficking in cultural property and related offences.

32. A first step to smooth this cooperation could be the adoption, by professionals and institutions or corporations operating in this sector, of codes of conduct or other similar tools (corporate guidelines, self regulations, etc.)<sup>47</sup>.

33. Such codes of conduct should:

- a. prevent cultural institutions from acquiring cultural properties that have been trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in, etc.;
- b. strengthen the co-operation between cultural institutions and law-enforcement agencies;
- c. disseminate a culture of compliance amongst museums’ and other cultural institutions’ functionaries and personnel;
- d. enable smaller, younger, less organized institutions to take advantage of the experience of larger, older, better organized, better funded or more innovative ones.

[BACKGROUND:] The adoption of codes of conduct is outlined in international conventions and other documents, namely:

a. article 31.2.b. of the UN *Convention against Transnational Organized Crime*<sup>48</sup> states that: "States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. These measures should focus on: [...] (b) The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants";

b. the UNESCO Convention, whose article 5, paragraph (e), requires States Parties to this Convention to establish “for the benefit of those concerned (curators, collectors, antique dealers, etc.) rules in conformity with the ethical principles set forth in this convention; and taking steps to ensure the observance of those rules”;

<sup>47</sup> See E/2010/30 and E/CN.15/2010/20. See also CTC/COP/2010/12\*.

<sup>48</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

c. the ICOM *Code of Conduct for Museums*<sup>49</sup> reflects principles generally accepted by the international museum community and encompasses a series of principles (designed to settle a minimum standard) as well as supporting guidelines for desirable professional practice;

d. the UNESCO *International Code of Ethics for Dealers in Cultural Property* provides a useful model<sup>50</sup>;

e. some national associations promote their own model codes of conduct or guidelines, such as, for example, the American AAMD (*Association of Art Museum Directors*)<sup>51</sup>;

f. article 8 of the *Convention against Corruption*<sup>52</sup> includes codes of conduct for public and private professional among the relevant measures States shall adopt in order to prevent corruption (which is often interrelated with trafficking in cultural property and the related offences);

g. at the regional level, according to Recommendation 16, 23 and 25 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>53</sup>, existing guidelines on due diligence (which shall include provenance researches to be undertaken before art loans are agreed), as well as the ICOM Code of Ethics, shall be followed by all museums in the EU. EU Member States which don't have yet such guidelines shall incorporate or adopt provisions of Codes of Ethics relevant to due diligence to be exercised by cultural heritage institutions, collectors, owners and dealers. Common standards shall be provided, concerning the necessary documentation before the acquisition of a cultural object (for example based on those provided by the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>54</sup> and by *Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material*, UK DCMS, October 2005<sup>55</sup>). The EU Commission shall promote the framing of a model Code of Ethics concerning acquisitions, lending and/or sales of cultural goods by professionals of cultural institutions, as well as collectors, owners, dealers, and auction houses. Museums shall also place their collections policies on their websites.

The collecting, spreading and sharing, even at international level, of best practices is outlined in international conventions and other documents, namely:

a. article 31, §1, *UN Convention against Transnational Organized Crime*<sup>56</sup>, stating that "1. States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime";

b. the UNODC Expert group *on protection against trafficking in cultural property* recommended the collection of best practices on marking and identification of cultural property by the ICOM and other competent organizations, as well as the spreading by UNODC of best practices in countering trafficking in cultural property via the Internet<sup>57</sup>;

c. ICOM publishes a large set of standards and guidelines<sup>58</sup> with the aim of implementing museum professionals' good practices related to registration, inventorying, marking and loans of cultural properties, as well as to mediation regarding restitution and training of museum personnel in the event of disasters, war, etc.;

34. [CONTENT:] States should encourage cultural institutions – both public and private – to adopt codes of conduct which can provide their personnel with clear and effective rules (including disciplinary sanctions) especially with regard to the fairness and transparency of acquisition policies, and the related duty to report suspect cases of trafficked, illicitly

<sup>49</sup> See <http://icom.museum/who-we-are/the-vision/code-of-conduct.html>.

<sup>50</sup> See <http://unesdoc.unesco.org/images/0012/001213/121320m.pdf>.

<sup>51</sup> See <http://aamd.org/papers/>.

<sup>52</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>53</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>54</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>55</sup> See [http://www.culture.gov.uk/images/publications/Combating\\_Illicit\\_Trade05.pdf](http://www.culture.gov.uk/images/publications/Combating_Illicit_Trade05.pdf)

<sup>56</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>57</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>58</sup> See <http://icom.museum/what-we-do/professional-standards/standards-guidelines.html>.

exported or imported, stolen, looted or illicitly excavated, or illicitly dealt in cultural property.

35. States should also encourage cultural institutions to effectively enforce and disseminate existing codes of conduct (particularly ICOM's<sup>59</sup> for major cultural institutions). States could consider directly entrusting the Central National Authority proposed in Guideline 4, with the task of promoting and developing these codes of conduct or guidelines, possibly through a public-private partnership.

36. States should encourage the private sector to adopt appropriate self-regulation, but may also consider intervening, when necessary, with public regulation and supervision<sup>60</sup>. In order to achieve a better prevention policy, States may consider drafting a "model" code of conduct for cultural institutions, or more generally offering guidelines for drafting such codes of conduct, possibly modelled on ICOM's<sup>61</sup>).

37. Codes of conducts should include clear and effective rules for auctioneers and dealers in the art antiques market, imposing effective disciplinary sanctions, when needed. They should promote the fairness and transparency of transactions (for example, through the keeping of a registry of all transactions of cultural objects<sup>62</sup>), as well as establish a duty to report suspected cases of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, or more generally illicitly dealt in cultural property.

38. Attention shall be paid also to rules of conduct when dealing with custom or police officials, civil servants, public functionaries, etc., in order to prevent possible bribery or corruption, which is often an integral part of illicit transactions in the art market.

39. States should consider promoting national and international dissemination of the highest standards in acquisition policies, and transparency in dealing with cultural property; States should also take all available measures in order to enhance the knowledge and diffusion of existing best practices amongst museums' and other cultural institutions' personnel, both at national and international level.

40. Such codes of conduct will also be relevant to stimulate an exchange amongst museums and other cultural institutions both directly and through the National Central Authority, and to strengthen rules of loyalty, impartiality and fairness for functionaries and employees.

41. States should consider fostering the adoption of the codes of conduct through a strategy based on incentives (for compliant operators) and disincentives (for non-compliant ones). In the case of public institutions, States may compel them to adopt such codes.

42. States may consider providing public funding to private museums, collections and other institutions that adopt the codes of conduct. States may consider introducing other economic (even fiscal) incentives on an *ad hoc* basis for institutions which are in compliance.

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<sup>59</sup> To this effect see also *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. II, Section D.

<sup>60</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>61</sup> To this effect see also *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. II, Section D.

<sup>62</sup> States adhering to the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, No. 11806) shall already have similar legislative provisions in accordance with article 10 of the Convention.

43. States whose laws or regulations impose professional requirements by way of licensing may consider making it a condition for the grant of a license to a corporate entity that the entity adopts a code of conduct or of corporate guidelines. The same condition could be introduced on an individual's access to professional registers, professional qualifications or licenses. States which don't possess a system of licenses or professional qualifications should consider adopting one. States may further consider a policy that allows public cultural institutions to trade only with dealers that operate under appropriate codes of conduct.

44. States whose laws provide for criminal liability for trafficking in cultural property and related offences even when the offence is committed out of negligence, may include the violation of a code of conduct as a consideration when assessing criminal negligence. States whose laws provide for corporate liability for trafficking in cultural property and related offences may consider granting a mitigation or exclusion of sanctions when a code of conduct or equivalent corporate guidelines is adopted and effectively enforced.

**GUIDELINE 6. States should consider encouraging cultural institutions and private sector to report suspected cases to law-enforcement agencies.**

45. [RATIONALE:] Both public and private cultural institutions should be charged with the legal obligation to report suspected cases of trafficking in cultural property (or other related offences) to enforcement agencies.

46. In case of "white-collar" offences, to which trafficking in cultural property and related offences can be largely equated, only a minority percentage of discovered offences can be traced back to institutional actors, while the largest number of reports comes from private entities. Besides, amongst the discoveries attributable to institutional actors, only a minimum percentage (about 6%) comes from agencies or authorities appointed by law to investigate and discover such offences.

47. Moreover, the art and antiquities market is particularly opaque, thereby increasing the need for States to find ways to motivate cultural institutions, which in such a market are "insiders", to report cases of trafficking in cultural property and related offences they come across in the course of their activities.

[BACKGROUND:] A system of reporting to enforcement agencies is outlined at both international and national level:

a. article 7 of the UN *Convention against Transnational Organized Crime*<sup>63</sup> states that reports by individuals and corporations on suspicious transactions shall be required by States in fighting money laundering and organized crime<sup>64</sup>;

b. the background note preparatory for the meeting of the UNODC Expert group *on protection against trafficking in cultural property* held in Vienna in 2009 underlines the great importance of encouraging legitimate actors to report suspicious objects to law-enforcement agencies<sup>65</sup>;

<sup>63</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>64</sup> See also article 14 of the United Nations Convention against Corruption (United Nations, *Treaty Series*, vol. 2349, No. 42146) for other similar provisions.

<sup>65</sup> See MACKENZIE S., *Protection against trafficking in cultural property*, background paper to the meeting of UNODC/CCPCJ/EG1/2009/2.

c. within the *Convention against Corruption*<sup>66</sup>, article 8 calls upon States to consider establishing measures to facilitate "the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions"; article 13 prescribes to State Parties to take appropriate measures to ensure easy access to the relevant agencies for the public to report (even anonymously) suspected cases of corruption, as well as to "provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities"; article 31 and article 34 present reports by private subjects as a relevant tool States shall consider implementing in the fight against corruption, a crime which can be instrumental to trafficking in cultural property and related offences;

d. at the regional level, according to Recommendation 24 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>67</sup>, EU Member States shall introduce a procedure for overseeing the acquisitions made by cultural institutions and collectors, owners and dealers, in order to ensure that any suspicious object, which is offered for sale, bequest or donation, be submitted to a fixed verification procedure. This procedure shall include an obligation for the museum to inform the competent central authority and to provide the requested documentation, as well as safe deposit of the tainted object; research on the provenance of the object (where there is a suspicion, the acquisition shall not be permitted); confiscation through a legal procedure; restitution of the object to the rightful owner; when needed, compensation of good faith purchaser.

e. Some States (such as Japan) compel to report cases related to suspected fraudulent cultural items<sup>68</sup>.

48. [CONTENT:] States should consider taking all possible measures in order to increase the number of suspected cases of trafficking and related offences reported by museums' and other cultural institutions'. This could be facilitated by the adoption of codes of conduct and the spreading of existing best practices, as well as other *ad hoc* interventions.

49. States may charge both public and private cultural institutions' personnel with a legal obligation to report suspected cases, backed by a proportionate and effective sanction in case of missed report. Alternatively, States may consider charging only public cultural institutions' personnel with a legal obligation to report suspected cases, while leaving private institutions' personnel to be dealt with according to internal regulations and codes of conduct, but for withdrawal of public funds to the institution if a voluntarily missed report is discovered by law-enforcement agencies.

50. Reports may be addressed directly to law-enforcement agencies or to the National Central Authority outlined in Guideline 4 (where created) for a preliminary evaluation. States may consider setting up under the same Central National Authority, a "cultural heritage hotline" to cater for the quick and discreet receipt of reports. States may also consider adopting other legislative provisions in order to protect possible whistleblowers inside cultural institutions against the risk of retaliations, harassment, dismissal, etc.

**GUIDELINE 7. States should consider promoting and supporting training on cultural property regulations for cultural institutions and private sector.**

51. [RATIONALE:] An awareness of laws, regulations and duties related to cultural property protection by personnel of cultural institutions important to promote a culture of compliance amongst professional operators and may contribute to the prevention of

<sup>66</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>67</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>68</sup> See the *Report* of UN Economic and Social Council's Secretary-General on *Protection against trafficking in cultural property*, 23 February 2010.

trafficking in cultural property and related offences. To implement this Guideline, States should need to promote and support specialised training on cultural property regulations for operators in public and private cultural institutions.

[BACKGROUND:] Some provisions regarding the transmission of information about regulation of cultural property to national cultural institutions are already part of many international conventions and documents:

a. article 30, §2, d, of the *UN Convention against Transnational Organized Crime*<sup>69</sup> states that : "2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations: [...] (d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programs and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention";

b. article 25 of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>70</sup> states that contracting Parties should spread knowledge of conventional provisions throughout their Countries, particularly by means of inclusion of the study of the same Conventions (and related regulations) in programs "of military and, if possible, civilian training, so that its principles are made known to the whole population, especially the armed forces and personnel engaged in the protection of cultural property"<sup>71</sup>;

c. article 5 and article 6 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>72</sup> provides for States Parties "spreading knowledge of the provisions" of the Convention itself, as well as of the prohibitions to export adopted according to the same Convention;

d. article 21 of the *Convention on the Protection of the Underwater Cultural Heritage*<sup>73</sup> prescribes that States Parties cooperate in the provision of "training in underwater archaeology", which may be considered including training in the provisions of the same Conventions and other relevant regulations;

e. amongst regional instruments, article 6 of the *European Convention on the Protection of the Archaeological Heritage*<sup>74</sup> binds States Parties to transmit the text of the Convention itself to private museums and other cultural institutions;

f. at the regional level, according to Recommendation 25 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>75</sup>, EU Member States shall disseminate to cultural heritage institutions the provisions of the 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>76</sup> concerning acquisitions, export authorisations and obligations of dealers (art. 6, 7, 10);

g. the UNODC Expert group *on protection against trafficking in cultural property* recommended, in its 2009 *Report*, that States provide, with the assistance of INTERPOL and the International Council of Museums, specialized training for museum personnel<sup>77</sup>;

h. the training of conservators, as well as of collections' and museums' personnel, is enlisted among the relevant preventive measures (that some States are already implementing and others shall adopt) to contrast trafficking in cultural property and related offences in other UN documents<sup>78</sup>;

<sup>69</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>70</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>71</sup> See also article 30 of the *Second Protocol* (United Nations, *Treaty Series*, vol. 2253, No. 3511).

<sup>72</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>73</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>74</sup> Council of Europe, *European Treaty Series*, No. 66.

<sup>75</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>76</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>77</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>78</sup> See, for example, E/CN.15/2010/6 and E/CN.15/2010/4. See also UNESCO General Conference, Twenty-eight Session (Paris, 1995), *Reports of Member States on Measures they have adopted to implement the Convention on the*

i. the ICOM have, for a long time, been organizing workshops worldwide on the illicit trafficking of cultural goods for museum professionals, police and customs agents<sup>79</sup>;

j. article 7 of *Convention against Corruption*<sup>80</sup> prescribes that States take appropriate measures to provide adequate training to civil servants, public officials and other public employees whose positions and activities imply a risk to be involved in corruption and other considered offences.

52. [CONTENT:] Specialized training programs for cultural institutions' personnel are required, in order to effectively pass the contents and spirit of the rules on to individuals. New laws, regulations or codes of conduct should be widely circulated to personnel of museums and other cultural institutions who should be made aware of their contents, implications and significance. This should ensure, more generally, a wider and well grounded culture of compliance amongst professional operators.

53. In order to practically promote and support such training programs, States may consider to directly finance training programs for personnel of public cultural institutions. States may also consider promoting a public-private partnership for training, through the activities of the Central National Authority outlined in Guideline 4, and sponsoring international exchanges for training purposes, through the help and support of international institutions such as ICOM, UNODC and UNESCO<sup>81</sup>.

**GUIDELINE 8. States should encourage internet providers and web based auctioneers to cooperate in preventing trafficking in cultural objects through the adoption of specific codes of conduct.**

54. [RATIONALE:] The constant and rapid development of e-commerce of cultural property has further aggravated the opaqueness of the art and antiquities market, as the sale of cultural objects through the Internet provides a convenient mechanism for putting assets of dubious provenance on the international market. Besides, the monitoring of such a vast virtual marketplace by law-enforcement agencies, without some form of cooperation by private operators<sup>82</sup>, is almost impossible. Therefore, with regard to internet providers and web based auctioneers, the first step for an articulated and (hopefully) effective prevention policy can be the adoption of codes of conduct.

[BACKGROUND:] International institution's attention has recently been drawn to cybercrime, as an emerging major criminal problem:

a. UNODC and the ECOSOC has urged Member States to "promote the drafting and adoption of codes of conduct and other mechanisms of corporate social responsibility for Internet service providers, mobile telephone companies, Internet cafes and other relevant key actors<sup>83</sup>";

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*Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*; UNESCO General Conference, Thirty-second Session (Paris 2003), *Reports of Member States on Measures they have adopted to implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.

<sup>79</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic/illicit-traffic-workshops.html>.

<sup>80</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>81</sup> See for example article 17 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, No. 11806).

<sup>82</sup> See also UNODC/CCPCJ/EG1/2009/2.

<sup>83</sup> See E/2011/30 - E/CN.15/2011/21. The Commission on Crime Prevention and Criminal Justice has hence convened an open-ended intergovernmental expert group to conduct a comprehensive study of the problem of cybercrime as well as the response to it (see E/2010/30, chap. I, sect. A, draft resolution IV, and E/2010/SR.45; see also the *General Assembly Resolution 65/230*).

b. faced with the growing trafficking of cultural goods on the Internet and the difficulties encountered by national authorities to control this phenomenon, UNESCO, in close cooperation with INTERPOL and the International Council of Museums (ICOM), makes available to Member States some *Basic Actions to counter the Increasing Illicit Sale of Cultural Objects through the Internet*<sup>84</sup>. The document asks States to: “1. Strongly encourage Internet sales platforms to post the following disclaimer on all their cultural objects sales pages: «With regard to cultural objects proposed for sale, and before buying them, buyers are advised to: i) check and request a verification of the licit provenance of the object, including documents providing evidence of legal export (and possibly import) of the object likely to have been imported; ii) request evidence of the seller's legal title. In case of doubt, check primarily with the national authorities of the country of origin and INTERPOL, and possibly with UNESCO or ICOM»; [...] 6. Establish legal measures to immediately seize cultural objects in case of a reasonable doubt concerning their licit provenance; 7. Assure the return of seized objects of illicit provenance to their rightful owners”.

c. at the regional level, according to Recommendation 37 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>85</sup>, EU Member States shall inform potential buyers about the risks of purchasing illegally acquired cultural goods via the internet; in particular, they shall consider requesting websites to introduce or insert a “flag” or notification that contains the regulations on the protection of cultural property when a prospective buyer is trying to buy.

d. The British Museum and the Museums, Libraries and Archives Council (MLA) have partnered with eBay.co.uk to ensure that antiquities found in the UK are being sold legally on its site. In order to prevent illegal sales of treasure, the Portable Antiquities Scheme (PAS, which is managed by the British Museum on behalf of the MLA) has set up a team to monitor antiquities sold on eBay.co.uk and to ensure that sellers have the right to trade them. Where the listing is illegal, PAS will report it to the Art and Antiques Unit of the Metropolitan Police and eBay.co.uk, which has committed to end illegal listings<sup>86</sup>. Analogous initiatives took place in cooperation with the Cultural Protection Offices of Austria, Germany and Switzerland.

55. [CONTENT:] States should take all relevant measures in order to control trafficking in cultural objects on the Internet and to ensure their seizure where there is a reasonable doubt concerning their licit provenance, as well as the restitution, return and repatriation to their rightful owners.

56. Therefore, in relation to trafficking in cultural property and related offences committed through the use of cyberspace, States should consider taking all appropriate measures to encourage internet providers and web based auctioneers to adopt codes of conduct. States may provide “model” codes of conduct and corporate guidelines or simply set the guidelines for them to draft their own codes of conduct.

57. The existing national and international codes of conduct for dealers in the art and antiquities market could be used as a basis for drafting these codes, which should then be adapted to the peculiarities of e-commerce. They should encompass clear and effective (i.e.: implying even disciplinary sanctions, when needed) rules, especially with regard to the fairness and transparency of transactions (for example, through the keeping of a registry of all on-line transactions of cultural objects), as well as related duties to report suspect cases of illicit cultural property.

<sup>84</sup> <http://www.unesco.org/culture/en/illicittrafficking/internettrafficking>.

<sup>85</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>86</sup> See <http://pages.ebay.co.uk/buy/guides/antiquities> and <http://pages.ebay.co.uk/help/policies/artifacts.html>

### Section III. Monitoring

#### **GUIDELINE 9. *States should consider introducing and implementing certificates for export and (where possible) import of cultural property.***

58. [RATIONALE:] States need to find ways to monitor the export of significant cultural property from their territories. The enacted tools should enable custom and border control authorities to verify that exported objects are not of illicit origin, or for example, subject to export limitations because of their relevant cultural interest for national heritage. Also, import certificates could substantially contribute to prevention and control of trafficking.

[BACKGROUND:] Export certificates are already provided for in many international conventions and other documents, and namely:

a. basic rules are established in article 6 and article 7 of the UNESCO *Convention* [1970]: they not only prescribe to States Parties to introduce an export certificate, but also state that the exportation of cultural property not accompanied by an export certificate shall be prohibited and the infringement of this prohibition shall be sanctioned by States;

b. a Model Export Certificate for Cultural Objects has been consequently prepared jointly by UNESCO and the World Customs Organization (WCO)<sup>87</sup>;

c. article 6 of the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>88</sup> values the absence of an export certificate, when required under the law of the State of provenance, as a clue to be taken into account when an evaluation of the possessor's good faith is required;

d. article 2 (f and g) of the UN *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>89</sup> asks for a "system whereby the export of movable cultural property is authorized by the issue of an export certificate" and the exclusion of a good faith defence for the possessor of a cultural object lacking the required export certificate;

e. at regional level, articles 2, 3 and 4, of the *Council Regulation (EC) n. 116/2009 of 18 December 2008 on the export of cultural goods (Codified version)* states that the export of cultural goods outside the customs territory of the European Community is subject to the presentation of an export licence, in support of the export declaration, at the customs competent office;

f. at the regional level, according to Recommendation 28 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>90</sup>, EU Member States shall consider the introduction of an import and/or movement certificate of cultural goods, in order to improve the traceability of cultural goods.

g. the *Report of the UNODC Expert group on protection against trafficking in cultural property*<sup>91</sup> (as well as other relevant UN documents<sup>92</sup>) invited UNODC, within its mandate, to encourage all Member States to use the Model Export Certificate for Movable Cultural Property, designed by UNESCO and WCO, and to assist them in its implementation;

<sup>87</sup> See [www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/practical-and-conductal-instruments/unesco-wco-model-export-certificate/](http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/practical-and-conductal-instruments/unesco-wco-model-export-certificate/) See also *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. I, Section C.

<sup>88</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>89</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>90</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>91</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>92</sup> See, for example, CTOC/COP/2010/12\*.

h. import certificates are not yet the object of international provisions or recommendations, albeit that the use of such tools is taken into account, for example, in the UNESCO *Handbook*<sup>93</sup>.

59. [CONTENT:] States should consider putting in place and implementing a system requiring export certificates and, where possible, of import certificates. States may choose a system of authorizations (where an owner or holder, who intends to export a cultural property, obtains an export license from the competent national authority, providing all relevant documentation), or a system of tacit consent (where an export license is issued by the competent national authority for a period of time determined by law and subject to internal checks, on the basis of a previous communication of the owner or holder's intention to export the cultural property).

60. The certificate should permit the easy and precise identification of the exported object (including photographs). It must indicate the owner, the duration of the export license (where temporary), the issuing authority, the object's destination, its legal status and use, and possibly its value. The requirement of the export certificate should be mandatory in that without it, any export of cultural property will be deemed illicit and forbidden under national laws. Moreover, a copy of the export certificate shall be presented to the Customs export office, which shall retain and register it, and another copy shall accompany the cultural object and shall be presented at importation into the country of destination, to certify the legality of the exportation. States should consider providing custom and border authorities with appropriate technology enable them to rapidly cross-check export certificates' data with the national inventory of cultural object database and national and international databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property [see also Guideline 2].

61. States should consider making the absence of an export certificate accompanying an exportation of cultural property, a suspicious transaction requiring compulsory reporting to the national competent authority of the State of origin. States may consider requiring the presence of a valid export certificate, issued by a competent authority of the State of provenance, in order to allow the importation of a cultural object. This could be done on the basis of bilateral or multilateral agreements or arrangements. A uniform international standard for import certificates should be possibly adopted, in order to facilitate the work of police and customs officials.

**GUIDELINE 10. States should consider creating and implementing monitoring programs for the market of cultural property, including on the Internet.**

62. [RATIONALE:] The same channels are used to trade both legal cultural properties and illegal ones. This overlapping is now greatly facilitated by on-line auctions and sales, as the Internet has no boundaries and it's easier for sellers and buyers to conceal their identity and to avoid national requirements for certification, licensing, etc.

63. Moreover, it must be underlined that a cultural property can be kept hidden for a long time (even years) before being introduced again into the market, in order to let law-enforcement agencies' alerts and investigations to drop. At the same time, illegally obtained cultural property can be put on the market with false documentation, or dismembered and

<sup>93</sup> See *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. I, Section A.

sold in a different part, to avoid detection. Finally, it can also be easily transferred and placed on markets where national laws are more “accommodating”.

[BACKGROUND:] Some international documents suggest the creation and implementation of market monitoring programs as an effective (albeit costly) strategy, namely:

a. UNESCO, in close cooperation with INTERPOL and the International Council of Museums (ICOM), makes available to Member States some *Basic Actions to counter the Increasing Illicit Sale of Cultural Objects through the Internet*<sup>94</sup>. The document asks States to “[...] 2. Request Internet platforms to disclose relevant information to law enforcement agencies and to cooperate with them on investigations of suspicious sales offers of cultural objects; 3. Establish a central authority (within national police forces or other), which is also responsible for the protection of cultural properties, in charge of permanently checking and monitoring sales of cultural objects via the Internet; [...] 5. Maintain statistics and register information on the checks conducted concerning the sale of cultural objects via the Internet, the vendors in question and the results obtained”. It also requires to States to “cooperate with national and foreign police forces and INTERPOL as well as the responsible authorities of other States concerned, in order to: (a) Insure that any theft and/or any illegal appropriation of cultural objects be reported to INTERPOL National Central Bureau, in order to enable relevant information to be posted on the INTERPOL Stolen Works of Art Database; (b) Make information available about theft and/or any illegal appropriation of cultural objects, as well as about any subsequent sale of such cultural objects, from or to national territories, using the Internet; (c) Facilitate rapid identification of cultural objects by: i) ensuring updated inventories with photographs of cultural objects, or at least their description, for example through the Object ID standard; ii) maintaining a list of recommended experts; (d) Use all the tools at their disposal to conduct checks of suspicious cultural property, in particular the INTERPOL Stolen Works of Art Database and the corresponding INTERPOL DVD; (e) Track and prosecute criminal activities related to the sale of cultural objects on the Internet and inform the INTERPOL General Secretariat of major investigations involving several countries [...]”.

b. in 2007 INTERPOL, UNESCO and ICOM jointly issued a paper of *Basic Actions concerning Cultural Objects being offered for Sale over the Internet*, which suggests to States (among others) to “establish a central authority (within national police forces or other), which is also responsible for the protection of cultural properties, in charge of permanently checking and monitoring sales of cultural objects via the Internet<sup>95</sup>”;

c. in the *Conclusions of the Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques*<sup>96</sup>, as well as in the *Conclusions of the Seventh Meeting of the INTERPOL expert group on Stolen Cultural Property*<sup>97</sup>, it was strongly recommended to UN member States to conclude agreements with auction platforms on the Internet in order to reduce illegal sales and to monitor this type of trade as effectively as possible;

d. the UN Commission on Crime Prevention and Criminal Justice has underlined how the monitoring of auction markets and the dissemination of information through publicly accessible websites shall be further developed and become more widespread among States<sup>98</sup>;

e. the 2009 *Report of the UNODC Expert group on protection against trafficking in cultural property* enlisted the implementation of systematic checks of cultural property, as well as the strengthening of cooperation in monitoring the Internet (possibly with the assistance of ICOM), amongst the preventive measures recommended<sup>99</sup>;

<sup>94</sup> <http://www.unesco.org/culture/en/illicittrafficking/internettraffic>.

<sup>95</sup> See <http://portal.unesco.org/culture/fr/files/21559/11836509429MesuresTraficIlliciteEn.pdf/MesuresTraficIlliciteEn.pdf>.

To the same effect, see also *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. II, Section A.

<sup>96</sup> See the conclusions of the INTERPOL’s Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, France, 17-19 June 2008.

<sup>97</sup> See the *Seventh Meeting of the INTERPOL expert group on Stolen Cultural Property*, Lyon, 23-24 February 2010, *Conclusions*.

<sup>98</sup> See E/2010/30-E/CN.15/2010/20.

<sup>99</sup> See UNODC/CCPCJ/EG1/2009/2.

f. according to Recommendations 34, 35 and 36 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>100</sup>, EU Member States shall formulate a standardized procedure for specific actions to be undertaken in relation to illicit trafficking of cultural goods via the Internet and to organize training of personnel for this purpose. In particular, States shall make contact with websites to inform them of the need to practice due diligence and require internet sellers, auction houses and private collectors to submit a list of past and present auctions of cultural objects and retain such lists for an adequate period of time before and after the auction. More generally, EU Member States shall try to increase efficiency of tracing or searching for missing objects with the development of advanced software for the purpose, to implement more systematic checks at customs and require copies of the export/or movement licences or certificates.

g. several States already possess (at least partial) monitoring programs for auctions, private catalogues, the Internet, etc.<sup>101</sup>.

64. [CONTENT:] The development of a monitoring program for the market of cultural properties could be implemented by States through a series of specific provisions.

65. One of them could be the creation of specialised investigative units (possibly including police and customs officers, as well as experts in arts and antiques) devoted to combating trafficking in cultural property and related offences, possibly within (or at least in close cooperation with) the National Central Authority charged with the protection of national cultural heritage (where enacted).

66. In addition, it is suggested that states introduce adequate technologies that will facilitate cross-checking between data coming from auctions' and galleries' catalogues, websites dealing in trading of cultural objects, etc., and databases of inventoried cultural properties and of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing ones.

67. Moreover, it is recommended that states implement public-private partnerships and joint monitoring programs, in order to better exploit the expertise of, and direct access to, the market of private operators, such as auction houses, professional dealers, internet providers, etc.

68. States should also increase the exchange of information with other States and, more generally, international cooperation in investigations. The assistance of ICOM, IFAR and other international institutions will be useful in this process so as to strengthen Internet monitoring.

**GUIDELINE 11. *States should consider creating and implementing programs of research, mapping and surveillance of archaeological sites.***

69. [RATIONALE:] A very difficult task is preventing the purloining and introduction on the illicit market of cultural objects not yet inventoried or even discovered. This may often happen as a consequence of lootings or illicit excavations of archaeological sites, both when they have been already discovered, but not fully studied or not effectively monitored, and when they have never been known to the authorities.

[BACKGROUND:] In order to tackle these phenomena, the development of programs of research, mapping and surveillance of archaeological sites is taken into account in many existing international conventions and other relevant documents:

<sup>100</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>101</sup> To this effect, E/CN.15/2006/14 and E/CN.15/2010/4. See also E/CN.15/2010/6.

a. article 5 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>102</sup> binds States Parties to organize the supervision of archaeological excavations and protect the areas reserved for future archaeological research;

b. the *Rules concerning activities directed at underwater cultural heritage*, annexed to the *Convention on the Protection of the Underwater Cultural Heritage*<sup>103</sup>, in particular Rules 1-8 and Rule 25, are aimed at granting, by the States Parties, the use of non-destructive techniques and survey methods in preference to recovery of objects, and underline the relevance of protection and management *in situ* with the adoption of programs of monitoring and protection against interference;

c. amongst regional conventions, article 2 and article 3 of the *European Convention on the Protection of the Archaeological Heritage (Revised)*<sup>104</sup> binds States Parties to take all possible measures in order to delimit and protect sites and areas of archaeological interest and to create reserve zones for future excavations, as well as to restrain illicit excavations;

d. in the *Conclusions of the Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques* it was strongly recommended to member States to monitor land and underwater archaeological sites<sup>105</sup>;

e. the UN Commission on Crime Prevention and Criminal Justice has underlined how the use of modern technology for the monitoring and protection of archaeological sites, such as metal detectors and space technology, shall be considered by member States<sup>106</sup>;

f. the UNODC Expert group *on protection against trafficking in cultural property*, in its 2009 *Report*, recommended to States to extend, as much as possible and whenever appropriate, the registration, guarding, monitoring and policing of archaeological sites, including those in which illegal excavations could be conducted, and preferably with the participation of local communities and the use of new technologies<sup>107</sup>;

g. policing and protecting archaeological sites is enlisted among the practical measures States shall implement in the *UNESCO Handbook*<sup>108</sup>;

h. some States already possess monitoring programs for archaeological sites, both on land and underwater<sup>109</sup>.

70. [CONTENT:] In order to ensure the protection of archaeological sites, States should consider promoting and supporting programs intended to research and map unknown archaeological sites through the use of adequate technologies, such as satellites and computer analysis of aerial images, metal detectors, etc.

71. States should also monitor (e.g. through cameras and electronic surveillance, satellites, etc.) discovered virgin archaeological sites, in order to detect attempts at illicit excavation or looting.

72. Moreover, States should establish effective surveillance to in-progress excavations, as well as to archaeological parks and monuments open to the public, to ensure that competent institutions have at their disposal adequate means and personnel to detect illicit excavation or looting.

<sup>102</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>103</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>104</sup> Council of Europe, *European Treaty Series*, No. 143.

<sup>105</sup> See the conclusions INTERPOL's Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, France, 17-19 June 2008.

<sup>106</sup> See E/2010/30-E/CN.15/2010/20. To the same effect see also CTOC/COP/2010/12\*.

<sup>107</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>108</sup> See the *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. II, Section A.

<sup>109</sup> See E/CN.15/2010/4. See also E/CN.15/2010/6 and the UNESCO General Conference, Thirty-second Session (Paris 2003), *Reports of Member States on Measures they have adopted to implement the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*.

73. To achieve these aims, States should encourage the direct involvement of local communities in the surveillance and preservation of archaeological sites and monuments, raising public awareness of their relevance and promoting programs of “neighbourhood watch” in respect local cultural heritage.

74. States may consider promoting public-private partnership in research and preservation programs, involving public and private research centres, universities, museums and other cultural institutions, and encouraging private sponsorships.

75. States should cooperate with each other and with international institutions in order to develop international programs of research and monitoring of archaeological sites, especially for unknown ones, through the most modern and effective technologies, such as satellites.

#### Section IV. Education and public awareness

**GUIDELINE 12.** *States should consider supporting and promoting public campaigns, including through the media, to foster a culture of care for cultural heritage among the general public.*

76. [RATIONALE:] The protection of cultural property can be better achieved when there is involvement of local communities and the general public in caring for their cultural heritage. Strong focus on public and media campaigns allows increased public interest in cultural heritage preservation and public reproach towards offenders.

77. Where the public awareness is high, it will be easier to monitor and preserve archaeological sites, monuments and cultural institutions, as local communities may activate formal or informal programs of “neighbourhood watch” with guard local cultural heritage.

78. At the same time, a more widespread basic knowledge of the arts, the national cultural heritage, its historical, artistic and economic value, and its significance for the national and international community, could contribute to a decrease in the number of offences against cultural property committed out of sheer ignorance, such as acts of vandalism, “petty” theft or looting of unregistered archaeological sites,.

79. The same basic knowledge could increase the number of reports by citizens of archaeological and artistic chance discoveries, as well as of suspected cases of trafficking in cultural property and related offences.

[BACKGROUND:] Several international conventions and other documents stress the importance of promoting public campaigns to foster among general public a culture of care for cultural heritage, namely:

a. article 5 and article 10 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>110</sup> bind States Parties to take “educational measures” in order to stimulate and develop in the public respect for the cultural heritage of all States, as well as the realization of the value of cultural property and of the threat to cultural heritage represented by thefts, clandestine excavations and illicit exports;

b. article 2 and article 20 the *Convention on the Protection of the Underwater Cultural Heritage*<sup>111</sup> promote every measure States could feasibly take to encourage responsible and non-intrusive access to underwater cultural heritage as a way to create “public awareness, appreciation, and protection of the

<sup>110</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>111</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

heritage”, and more generally prescribes that each State Party take all practical measures to “raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it”;

c. article 2(h), *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>112</sup>, directs States to use all the means at their disposal, “including the fostering of public awareness”, to prevent offences against cultural property;

d. at regional level, the Council of Europe *Framework Convention on the Value of Cultural Heritage for Society*<sup>113</sup> expresses the multifarious values of cultural heritage and of the necessity for all social actors to cooperate in protecting and making the most of it, and stresses factors such as joint actions, public participation, education, access to monuments, cultural institutions, etc., spreading of information relating to cultural heritage<sup>114</sup>;

e. article 11-14 of the said convention also calls upon States, by educational means and the promotion of public access to important archaeological findings, to encourage a realisation of the value of archaeological heritage for understanding the past, as well as of the threats represented by thefts and illicit excavations;

f. the UNODC Expert group *on protection against trafficking in cultural property* recommended to States and international organizations to promote education and launch awareness-raising campaigns in order to disseminate information on the theft and looting of cultural property, as well as to discourage potential buyers from collecting antiquities of dubious provenance and encourage citizens to report findings<sup>115</sup>;

g. the UNODC Expert group *on protection against trafficking in cultural property*, in its 2009 *Report*, recommended to States and international organizations to avail themselves of the media for their educational and awareness-raising campaigns<sup>116</sup>;

h. many other international documents underline the need for a more widespread commitment to cultural heritage preservation amongst civil society, to be achieved (even) through apposite public campaigns<sup>117</sup>;

i. the *Resolution 2008/23* of the UN Economic and Social Council urged Member States to protect cultural property and prevent trafficking by promoting education, launching awareness-raising campaigns, involving the media and disseminating information on the theft and pillaging of cultural property<sup>118</sup>;

j. the UN Commission on Crime Prevention and Criminal Justice expressed similar recommendations<sup>119</sup>.

80. [CONTENT:] States should consider promoting and supporting a comprehensive program to raise public awareness and support a general culture of care for cultural heritage. This can be achieved through a series of measures such as sensitization programs for children and juveniles at school, including through the study of arts in school, facilitation of public access to relevant cultural institutions, monuments, and events, development of programs aimed at enhancing citizens’ knowledge of the cultural heritage of their neighbourhoods and to increase their commitment to its preservation, support for local

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<sup>112</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>113</sup> Council of Europe *Treaty Series* - No. 199.

<sup>114</sup> See particularly of the *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, Faro, 27 October 2005.

<sup>115</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>116</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>117</sup> See for example E/RES/2008/23. See also: E/2010/30 - E/CN.15/2011/21; E/CN.15/2010/6; the conclusions of the INTERPOL’s Seventh International Symposium on the Theft of and Illicit Traffic in Works of Art, Cultural Property and Antiques, Lyon, France, 17-19 June 2008; the *Legal and Practical Measures against Illicit Trafficking in Cultural Property*, Part. II, Section A.

<sup>118</sup> See E/RES/2008/23.

<sup>119</sup> See E/2010/30 - E/CN.15/2010/20 and E/2011/30 - E/CN.15/2011/21.

museums and cultural institutions, including through promoting the development of networks of smaller institutions, launching of media campaigns, etc..

81. States should involve the National Central Authority and/or other authorities for the protection of cultural heritage, in such programs. They should also cultivate partnerships amongst public authorities, research institutions, cultural institutions (both public and private) and professional operators in the art and antiques market, to support and implement the sensitization programs.

82. States should promote international cultural exchange programs for youths and, more generally, international cooperation in sensitization campaigns, including by availing themselves of the cooperation and expertise of international institutions such as UNESCO and ICOM.

Advance unedited version

## Chapter II. Criminal justice policies

### Section I. International legal texts

**GUIDELINE 13.** *States should consider adopting criminal law responses and applying existing international instruments (in particular the United Nations Convention against Transnational Organized Crime,) in relation with cultural heritage protection.*

83. [RATIONALE:] States should adopt, implement and, when needed, strengthen domestic criminal law responses to combat trafficking in cultural property and related offences. Such responses must be accompanied by the respect of the principles of necessity and proportionality. A coordinated effort to counter this illicit traffic must be exercised at international level. To this end, States should consider applying already existing international conventions which include provisions for the criminalization of trafficking in cultural property and other related offences.

84. The adoption and implementation of criminal law instruments through the application of international convention can bring several advantages. Firstly, the introduction of criminal offences, with proportionate, dissuasive and effective sanctions, can enhance prevention of trafficking in cultural property. Secondly, it could also enhance public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Thirdly, the application of existing international conventions to this effect could foster harmonisation of criminal law amongst States. Moreover, this could in turn facilitate investigative and judicial cooperation amongst States when dealing with offences against cultural property.

85. The application of the provisions of the *United Nations Convention against Transnational Organized Crime*<sup>120</sup> to offences against cultural property, that are transnational in nature, involves an organized criminal group and are serious as defined by article 2(b) of the convention, can be effective in dealing with the most serious offences against cultural property.

[BACKGROUND:] The use of existing international conventions for the purpose of combating offences against cultural property through the use of criminal law instruments has been taken into account and positively evaluated:

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which expressly stated that “States should have legislation that is appropriate for criminalizing trafficking in cultural property and that takes into account the specificities of such property”, and invited States to consider ratifying the conventions related to protection against trafficking in cultural property, in particular the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>121</sup>, the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>122</sup> and the *Convention against Transnational Organized Crime*<sup>123</sup> (States were invited also to consider making trafficking in cultural property a “serious crime” in accordance with article 2(b) of the convention)<sup>124</sup>;

b. by the conference of UN Member States in the *Salvador Declaration*, which particularly urged States to “develop effective legislation to prevent, prosecute and punish” any offence against cultural

<sup>120</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>121</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>122</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>123</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>124</sup> See UNODC/CCPCJ/EG1/2009/2.

property “and to strengthen international cooperation and technical assistance in this area”, bearing in mind the existing international instruments (including the *Convention against Transnational Organized Crime*)<sup>125</sup>;

c. by the Conference of the Parties to the *Convention against Transnational Organized Crime* in its *Resolution 5/7* of 2010<sup>126</sup>, which encouraged States to make full use of this convention in order to tackle criminal offences against cultural property, and particularly invited Member States to consider such offences as serious crimes according to article 2(b) of the same convention;

d. by the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2010, on *Crime prevention and criminal justice responses to protect cultural property*<sup>127</sup>, as well as in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>128</sup>, with similar recommendations and express invitation to States which are not yet parties to the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>129</sup>, or to the *Convention against Transnational Organized Crime*<sup>130</sup>, or to the *Convention against Corruption*<sup>131</sup>, to become parties.

86. [CONTENT:] States may avail themselves of the relevant provisions included in:

a. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>132</sup> (see, in particular, article 28) and the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>133</sup> (see, in particular, article 15), with regard to violations against cultural property committed in the event of armed conflict (in the latter case “serious violations”);

b. the *Additional Protocols of 1977 to the Geneva Conventions of 1949*<sup>134</sup>, also with regard to crimes against cultural property committed in the event of armed conflict (see, in particular, articles 53 and 85);

c. the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>135</sup> (see, in particular, article 6(b), articles 7(b), 8 and 10), which provide for States Parties to impose either criminal or administrative sanctions for the illicit export and import of cultural property. It is recommended that States should consider imposing criminal at least in respect of the most serious offences;

d. the *Convention on the Protection of the Underwater Cultural Heritage*<sup>136</sup> (see, in particular, article 17), which provides for States Parties to impose sanctions “adequate in severity to be effective in securing compliance” for violations of the measures they have taken to implement the *Convention* itself (States should consider choosing penalties when needed and proportionate to the gravity of the offence);

e. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property, Delphi, 23 June 1985*<sup>137</sup> (see, in particular, article 17), which provides for States Parties to take all “necessary measures for adequate sanctioning” of offences

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<sup>125</sup> See the Salvador Declaration on Comprehensive Strategies for Global Challenges.

<sup>126</sup> See CTOC/COP/2010/17.

<sup>127</sup> See E/2010/30 - E/CN.15/2010/20.

<sup>128</sup> See E/2011/30 - E/CN.15/2011/21.

<sup>129</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>130</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>131</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>132</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>133</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>134</sup> United Nations, *Treaty Series*, vol. 1125, Nos. 17512 and 17513.

<sup>135</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>136</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>137</sup> Council of Europe, *European Treaty Series*, No. 119.

against cultural property (States should consider choosing criminal sanctions when needed and proportionate to the gravity of the offence);

f. the *Convention against Transnational Organized Crime*<sup>138</sup> (in particular, articles 2(b) and 3), in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention in the maximum (or a more serious penalty);

g. the *Convention against Transnational Organized Crime*<sup>139</sup> (see, in particular, articles 6 and 8) and the *Convention against Corruption*<sup>140</sup> (see, in particular, articles 6 and 15(f)) in relation to the laundering of proceeds of crimes including crimes against cultural property and corruption (which is often instrumental to trafficking in cultural property and related offences).

87. States that are not already parties, should consider becoming parties to the aforementioned conventions. If they are already parties, but have not yet fully implemented the conventions, they should consider adopting all relevant criminal law provisions to implement them.

**GUIDELINE 14. *In bilateral cooperation, States may consider making use of the UN Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property.***

88. [RATIONALE:] States may consider following the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>141</sup> in bilateral cooperation, and translating it into their national legislations, where suitable.

89. The adoption and implementation of criminal law instruments based on the *Model Treaty* could present many advantages, considering the fact that this text has been already agreed on at the international level and that the implementation of such existing model could open the path for any future further specific international action on the protection of cultural property through criminal law instruments.

[BACKGROUND:] An effort to find ways of making more effective the above mentioned model treaty was recommended, among others:

a. by ECOSOC *Resolutions* 2008/23 and 2011/42;

b. by the UNODC Expert group *on protection against trafficking in cultural property*, which asked to UNODC to continue to invite all Member States to submit in writing their views on the model treaty, including on the practical utility of the model treaty and on whether any improvements to it should be considered<sup>142</sup>;

c. by the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2010, *on Crime prevention and criminal justice responses to protect cultural property*<sup>143</sup>, as well as in its *Draft*

<sup>138</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>139</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>140</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>141</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>142</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>143</sup> See E/2010/30 - E/CN.15/2010/20.

resolution of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>144</sup>, with similar recommendations and a further invitation to consider even other normative developments, when appropriate.

90. [CONTENT:] In particular, States may consider translating into their national legislations the provisions of article 2, (a), (b) and (c), concerning illicit import, export and dealing in cultural property, and article 3 (*Sanctions*) of the *UN Model Treaty*. In doing so, they can adopt either criminal offences and sanctions, or administrative ones, depending on their prevention needs (applying the parsimony principle, or *extrema ratio*, while considering the use of penalties) and to the seriousness of the offence (respecting both harm principle and proportionality principle).

91. States may even consider improving existing international texts or promoting the adoption of a new one, in order to foster a uniform criminalization of offences against cultural property and to enhance investigative and judicial cooperation in respect of such offences. States may also consider exploring other possible normative developments.

## Section II. Criminal and administrative offences

**GUIDELINE 15.** *States should consider defining the concept of “movable cultural property” for the purposes of criminal law.*

92. [RATIONALE:] States should consider adopting a clear and shared (i.e.: harmonizing as far as possible) definition of what should be considered a “movable cultural property”, at least for purposes of the criminal law.

93. The presence of such a definition should provide clarity and precision to criminal law provisions on offences against cultural property. It can be also useful to support international investigative and judicial cooperation in combating crimes against cultural property, and avoid refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality. A common definition of the object of criminal conduct is an essential part of any harmonisation of national criminal legislations on this matter. Moreover, it can favour a more general adoption by States of a common list of offences related to cultural property.

[BACKGROUND:] Some definitions of “movable cultural property” are already provided for in international documents, such as:

- a. article 1 of the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>145</sup>;
- b. article 2 of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>146</sup> (upon which the former is drafted);
- c. article 1 and the Annex to the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>147</sup> (which is also consistent with the convention just mentioned above);

<sup>144</sup> See E/2011/30 - E/CN.15/2011/21.

<sup>145</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>146</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>147</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

d. article 1 of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>148</sup>, which makes no difference between movable and immovable cultural property and adopts a less analytical definition;

e. article 1 of the *Convention on the Protection of the Underwater Cultural Heritage*<sup>149</sup>, which makes no difference between movable and immovable cultural property and is limited to “underwater cultural heritage”;

f. article 2 and *Appendix II*, par. 1, of the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>150</sup>, which provide a very detailed definition of cultural property;

g. article 1 of the *European Convention on the Protection of the Archaeological Heritage (Revised)*<sup>151</sup>, although its definition is limited to “archaeological objects”;

h. article 1 and *Annex I* to the EU Regulation 116/2009 of 2008 *on the export of cultural objects* (Codified version), which provide a very detailed definition of “cultural goods”;

i. article 1 and the *Annex I* to EC Directive 93/7/EEC of 1993 *on the return of cultural objects unlawfully removed from the territory of a Member State*, which provide a detailed definition of “cultural object”.

94. [CONTENT:] States should consider making every effort to introduce criminal offences for the protection of cultural property on the basis of a preliminary clear definition of what should be considered a “movable cultural property”. Such definition should be as consistent as possible in all the relevant national laws, in order to facilitate international cooperation. States should include in the definition of movable cultural property, parts that have been removed or dismembered from artistic, historical or religious monuments.

95. States should take into account the definitions already existing at international level, namely those adopted by UNESCO and by the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>152</sup>.

**GUIDELINE 16. States should consider introducing in their criminal legislation an offence of trafficking in movable cultural property**

96. [RATIONALE:] States should consider introducing a dedicated criminal offence, as uniform as possible amongst different national legislation, to prevent and sanction trafficking in movable cultural property.

97. The introduction of the criminal offence of trafficking in cultural property may enhance prevention of conduct harmful to cultural heritage, such as stealing, pillaging and illicit export of cultural property, as well as illicit excavation and looting of archaeological sites, etc., as all these offences are intended to illicitly put cultural objects on the market, to which trafficking is directly instrumental.

98. Such an offence could be used to effectively fight organized forms of illicit dealing in cultural property, by traditional organized criminal groups and others, including

<sup>148</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>149</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>150</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>151</sup> Council of Europe, *European Treaty Series*, No. 143.

<sup>152</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

professional (individual or corporate) dealers in art and antiques, who may be tempted to mingle licit and illicit transactions.

99. At the same time, it may strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. It may also facilitate investigative and judicial cooperation amongst States. In particular, it could assist in reducing the incidents of refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality and discourage forum shopping by criminals.

[BACKGROUND:] The adoption of criminal law provisions against trafficking in cultural property has been recommended in many relevant international documents, in particular:

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which expressly stated that “States should criminalize activities related to trafficking in cultural property by using a wide definition that can be applied to all stolen and illicitly exported or imported cultural property” and shall “criminalize the import, export or transfer of cultural property in accordance with article 3 of the 1970 Convention”, as well as “consider making trafficking in cultural property (including stealing and looting at archaeological sites) a serious crime in accordance with their national legislation and article 2 of the *Convention against Transnational Organized Crime*<sup>153</sup>, especially when organized criminal groups are involved”<sup>154</sup>;

b. by the conference of UN Member States in the *Salvador Declaration*, which particularly urged States to “develop effective legislation to prevent, prosecute and punish” any offence against cultural property<sup>155</sup>;

c. by the Conference of the Parties to the *Convention against Transnational Organized Crime* in its *Resolution 5/7* of 2010<sup>156</sup>, which encouraged States to make full use of the convention in order to combat criminal offences against cultural property, and particularly invited Member States to consider such offences as serious crimes according to article 2(b) of the same convention;

d. by the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2010, on *Crime prevention and criminal justice responses to protect cultural property*<sup>157</sup>, as well as in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>158</sup>, which also invited Member States to make such offences into serious crimes according to article 2(b) of *Convention against Transnational Organized Crime*<sup>159</sup>;

e. by the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>160</sup>, in article 2, which states that States shall “take the necessary measures to prohibit the import and export of movable cultural property which has been stolen in the other State Party or which has been illicitly exported from the other State Party”, as well as “to prohibit the acquisition of, and dealing within its territory with, movable cultural property which has been imported contrary to the prohibitions resulting” from the former measures;

f. by the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>161</sup> (article 7(b) and article 8), which does not expressly mention an offence of trafficking, but requires States Parties to impose “penalties or administrative sanctions” on any

<sup>153</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>154</sup> See the *Report on the meeting of the expert group on protection against trafficking in cultural property held in Vienna from 24 to 26 November 2009*.

<sup>155</sup> See *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World* (A/CONF.213/18).

<sup>156</sup> See the *Report of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime on its fifth session, held in Vienna from 18 to 22 October 2010*.

<sup>157</sup> See E/2010/30 - E/CN.15/2010/20.

<sup>158</sup> See E/2011/30 - E/CN.15/2011/21.

<sup>159</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>160</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>161</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

person responsible for infringing the prohibition of importing a cultural property “stolen from a museum or a religious or secular public monument or similar institution in another State Party” (provided that such property is documented as appertaining to the inventory of that institution);

g. by the *Convention on the Protection of the Underwater Cultural Heritage*<sup>162</sup> (articles 14 and 17), which provide for States Parties to impose sanctions “adequate in severity to be effective” for violations of measures taken to implement the Convention itself, including all necessary measures “to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered”;

h. at regional level, by the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>163</sup> (articles 1, 3, and 12 and *Appendix III*), which provide that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” *.Appendix III* provides a list of conduct, some of which could be defined as “trafficking in cultural property” (for example the receiving or handling of cultural property coming from a previous enlisted offence, or the acquisition, concealment or alienation of archaeological property discovered as a result of illicit excavations).

100. [CONTENT:] The offence of trafficking in movable cultural property should seek to punish the import, export, acquisition, sale, delivery, movement or transfer of any illicitly exported or imported, stolen, looted or illicitly excavated movable cultural property. It should be sanctioned with deprivation of liberty, in addition to a fine and/or order of disqualification from further dealing in cultural property. In particular, it shall be a “serious offence” according to article 2(b) of the *Convention against Transnational Organized Crime*<sup>164</sup>. This offence should be as uniformly defined amongst national legislations as possible and it should be clearly distinguished from the mere unlawful import or export of cultural property (i.e., the import and export of a cultural property in absence of the required certificate, or license, or authorization).

101. An aggravating circumstance (or a more serious self-standing offence) should be provided for in the following cases: trafficking by an organized criminal group, damage to cultural property during or because of the conduct related to trafficking and trafficking committed by professionals.

102. Statutes of limitation should be adapted to the specificities of this offence. States should consider either ensuring longer terms in their statute of limitations for trafficking, or providing that time limitations should begin to run when the trafficked cultural object is discovered.

**GUIDELINE 17. States should consider introducing in their legislation criminal offences of illicit export and illicit import of movable cultural property.**

103. [RATIONALE:] States should consider introducing in their legislation a criminal offence of illicit export of movable cultural property. States may also consider introducing a criminal offence of illicit import of movable cultural property.

104. The introduction of such offences is necessary for several reasons. Firstly, the illicit export of cultural property deprives States of important elements of their cultural heritage. Moreover, the illicit export or import of a cultural property is often the first step to illicitly introduce it on the market. Therefore, the introduction of apposite offences for these

<sup>162</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>163</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>164</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

conducts, with an adequate sanctioning, can greatly improve both prevention and repression of trafficking in cultural property and related offences. In addition, the adoption of an offence as uniform as possible amongst different national legislations could facilitate administrative and judicial cooperation amongst States, also with a view to return, restitution and repatriation of the illicitly imported or exported cultural property. Finally, harmonized legislation to counter illicit import and export of cultural property could discourage “forum shopping” by operators in the art and antiquities market.

[BACKGROUND:] Several relevant international documents and conventions recommend or provide for prohibiting and sanctioning the import or export of cultural property in violation of national laws or regulations. In particular:

a. the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>165</sup> (article 3) states that States shall impose sanctions upon any person responsible for the illicit import or export of movable cultural property;

b. the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>166</sup> (article 3, article 6(b) and article 8) provides that “the import, export or transfer of ownership of cultural property effected contrary to the provisions adopted” under the *Convention* itself by the States Parties “should be illicit” and the export of cultural property without the prescribed certificate shall be prohibited and punished either with penalties or administrative sanctions;

c. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>167</sup> (article 1, article 3, article 12 and *Appendix III*) states that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” and in *Appendix III* includes as convention “offences”, the “actual or attempted exportation of cultural property the exportation of which is prohibited by the law of a Party”, as well as “exportation or attempted exportation, without authorisation of the competent authorities, of cultural property the exportation of which is made conditional on such an authorisation by the law of a Party”;

d. the UNODC Expert group *on protection against trafficking in cultural property* expressly stated that States shall “criminalize the import, export or transfer of cultural property in accordance with article 3 of the 1970 Convention”<sup>168</sup>;

e. the conference of UN Member States in the *Salvador Declaration* urged States to “develop effective legislation to prevent, prosecute and punish” any offence against cultural property<sup>169</sup>;

f. the Conference of the Parties to the *Convention against Transnational Organized Crime*<sup>170</sup> in its *Resolution 5/7* of 2010<sup>171</sup> encouraged States to make full use of this convention in order to combat criminal offences against cultural property, and particularly invited Member States to consider such offences as serious crimes according to article 2(b) of the same convention.

105. [CONTENT:] States should consider introducing in their national legislation, the offence of exporting movable cultural property without the required export certificate, license or authorization. States may also consider making it an offence to import movable cultural property without the required import certificate, license or authorization.

106. States should provide proportionate, effective and dissuasive sanctions for such offences. In particular, if the sanction is a pecuniary one, the fine could be linked to the

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<sup>165</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>166</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>167</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>168</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>169</sup> See *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World* (A/CONF.213/18).

<sup>170</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>171</sup> See CTOC/COP/2010/17.

value of the cultural property involved and/or to the economic capacity of the offender. States should also consider the use of disqualifications as criminal sanctions for illicit export and or export of cultural property, where the offender is a professional working with cultural property.

107. States should coordinate the offences of illicit import and export of cultural property with the offence of trafficking in cultural property, taking into account the gravity of the offence, the possible adoption of a model of progressive sanctioning, and the principle of proportionality.

**GUIDELINE 18.** *States should consider introducing in their criminal legislation an offence of theft of movable cultural property or make it an aggravating circumstance of the offence of ordinary theft.*

108. [RATIONALE:] States should, because of the harm that it does to its natural heritage, consider making the theft of cultural property a more serious offence than ordinary theft. State may also impose harsher punishment for the offence of pillaging of archaeological sites or monuments, or make it an aggravating circumstance where a cultural property was stolen through pillaging.

109. This could more adequately address the greater seriousness of crimes against a property which has also a relevant cultural value. Moreover, it could enhance prevention of conduct greatly harmful to cultural heritage and strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it.

[BACKGROUND:] Several relevant international documents and conventions recommend or provide for criminalizing specifically the theft of cultural property. In particular:

a. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>172</sup> (article 4 and article 28) and its *Second Protocol*<sup>173</sup> (article 15) bind States Parties to prohibit and prevent any form of theft, pillage or misappropriation of cultural property in the event of an armed conflict, and to establish as criminal offences under domestic law these types of conduct;

b. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>174</sup> (articles 1, 3 and 12) provide that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property”. *Appendix III* enlists as “offences” relevant to conventional provisions “thefts of cultural property”, “appropriating cultural property with violence or menace” and “acts which consist of illegally appropriating the cultural property of another person, whether such acts be classed by national law as misappropriation, fraud, breach of trust or otherwise”;

c. the UNODC Expert group *on protection against trafficking in cultural property* stated that States shall criminalize stealing of cultural property and consider making it into a serious crime in accordance with their national legislation and article 2(b) of the *Convention against Transnational Organized Crime*<sup>175</sup>, “especially when organized criminal groups are involved”<sup>176</sup>;

d. the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>177</sup>, invited Member States to criminalize stealing of cultural property and to make this offence into a serious crime according to article 2(b) of the *Convention against Transnational Organized Crime*.

<sup>172</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>173</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>174</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>175</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>176</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>177</sup> See E/2011/30 - E/CN.15/2011/21.

110. [CONTENT:] States should punish any theft of a movable cultural property, whether publicly or privately owned, any illicit removal and appropriation of parts of immovable cultural properties or monuments, any pillaging of cultural properties from museums, collections, libraries or other cultural institutions, as well as from monuments or archaeological sites.

111. According to their national criminal legislation and taking into consideration the principle of proportionality, States may either introduce a specific criminal offence of theft of cultural property, or make it an aggravating circumstance to the offence of theft.

112. Theft of cultural property should be adequately sanctioned, so as to take into account the harm it causes to cultural heritage. In particular, it should be sanctioned with deprivation of liberty, with an additional option of fine and/or professional disqualification (where feasible). It should be made a “serious offence” according to article 2(b) of the *Convention against Transnational Organized Crime*<sup>178</sup>. In addition, it could include an aggravating circumstance when the cultural property is damaged while being stolen and due to conduct related to the theft. It should be uniformly defined in all relevant national legislation. States should allow courts to award damages for compensation for the harm suffered by the legitimate owner as a consequence of the offence.

**GUIDELINE 19. States should consider introducing in their legislation a criminal offence of looting of archaeological and cultural sites, and/or a criminal offence of illicit excavation.**

113. [RATIONALE:] States should consider introducing in their criminal legislation an offence of looting of archaeological and cultural sites. States may also consider introducing an offence, either criminal or administrative in nature, of archaeological excavations carried out without the prescribed authorizations, permits or licenses.

114. The introduction of specific offences related to an illicit exploitation and management of archaeological or cultural sites could more adequately address the greater seriousness of crimes against property or landscape which imply also a relevant harm to cultural heritage. In particular, it could help prevent the loss of archaeological, scientific and historic data, which can result from archaeological excavations carried out according to prescribed protocols. It can also prevent conduct that is harmful to cultural heritage and assist in reinforcing public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Finally, the introduction of these offences by all States can facilitate investigative and judicial cooperation amongst States in combating illicit archaeological excavations and looting (as well as, trafficking) of cultural property. In particular, it can assist States to avoid refusals of requests for extradition or, more generally, cooperation, due to lack of dual criminality.

[BACKGROUND:] Several relevant international documents and conventions recommend or provide for criminalizing the looting or illicit excavation of archaeological and cultural sites. In particular:

a. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>179</sup> (articles 4 and 28) and its *Second Protocol*<sup>180</sup> (article 15) binds States Parties to prohibit and prevent any form of pillage

<sup>178</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>179</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>180</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

or extensive appropriation of cultural property in the event of an armed conflict, and to establish as criminal offences under domestic law these conducts;

b. the *Convention on the Protection of the Underwater Cultural Heritage*<sup>181</sup> (articles 10, 12 and 17) states that the States Parties “may take all practicable measures” to “prevent any immediate danger to underwater cultural heritage, whether arising from human activity or any other cause including looting”, and that “each State Party shall impose sanctions for violations of measures it has taken” to implement the convention itself, sanctions which “shall be adequate in severity to be effective” and “to discourage violations”;

c. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>182</sup> (articles 1, 3, 12) states that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” and *Appendix III* lists as convention offences, “violation of the legal provisions of a Party according to which archaeological excavations may only be carried out with the authorisation of the competent authorities”, as well as “concealment or alienation of archaeological property discovered as a result of excavations carried out in violation” of such legal provisions, “violation of the legal provisions of a Party, or of an excavation licence issued by the competent authorities, according to which the person who discovers archaeological property as a result of duly authorised excavations is held to declare such property to the competent authorities”, as well as “concealment or alienation of such property”, and also “violation of the legal provisions of a Party according to which the use of metal detectors in archaeological contexts is either prohibited or subject to conditions”;

d. the UNODC Expert group *on protection against trafficking in cultural property* stated that States shall criminalize looting of cultural property and consider making it into a serious crime in accordance with their national legislation and article 2(b) of the *Convention against Transnational Organized Crime*<sup>183</sup>, “especially when organized criminal groups are involved”<sup>184</sup>;

e. the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>185</sup>, invited Member States to criminalize looting at archaeological and other cultural sites and to make this offence into a serious crime according to article 2(b) of *Convention against Transnational Organized Crime*.

115. [CONTENT:] States should consider introducing a specific criminal offence in order to punish any form of looting of an archaeological or cultural site, whether already studied and registered, or unknown and newly discovered. States should define “looting” to include the pillage of cultural property found within a site, the loss of archaeological, scientific and historic data caused by the pillage itself as well as by excavations which are not carried out according to the prescribed protocols.

116. States should also introduce adequate criminal sanctions which reflect the harm to cultural heritage and to historic and scientific knowledge in addition to the damage caused to the property and/or landscape. In particular, such conduct should be sanctioned with deprivation of liberty and the imposition of a fine and/or professional disqualification (where feasible).

117. States should consider the possibility of making the offence of looting a “serious offence” according to article 2(b) of the *Convention against Transnational Organized Crime*<sup>186</sup>, and ensure that this is reflected in all relevant legislation.

118. States should introduce a further specific offence of illicit archaeological excavation. Such an offence will arise where an excavation is carried out without

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<sup>181</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>182</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>183</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>184</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>185</sup> E/2011/30 E/CN.15/2011/21.

<sup>186</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

authorization or without compliance with the terms of a prior authorization or in infringement of the rules governing such excavations. The offence of illicit excavation should be uniformly defined in all relevant national legislation. The unjustified possession of metal detectors and/or their unauthorized use in archaeological contexts should be made an administrative offence.

119. States should sanction illicit excavation with proportionate, effective and dissuasive sanctions, either criminal or administrative in nature and, including professional disqualifications, fines or other non-custodial sanctions. States should allow courts to award damages for compensation of the harm suffered as a consequence of the offence.

**GUIDELINE 20. States should consider introducing in their criminal legislation other offences related to movable cultural property.**

120. [RATIONALE:] States should consider introducing other specific criminal offences when the object of the criminal conduct is a movable cultural property. In particular, they should consider introducing specific criminal offences for illicit dealing in movable cultural property, forgery of movable cultural property, and damaging or vandalizing of movable cultural property or making them aggravating circumstances of the offence of theft.

121. Such provisions can more adequately address the greater seriousness of crimes against properties which have also a relevant cultural value. It could also enhance prevention of conduct greatly harmful to cultural heritage and strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Moreover, they could facilitate investigative and judicial cooperation amongst States in combating them. In particular, the adoption by all States of such criminal provisions may reduce the incidents of refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality.

[BACKGROUND:] Several relevant international documents and conventions recommend or provide for criminalizing specifically the damaging, forgery or illicit dealing in cultural property. In particular:

a. the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>187</sup> expressly states in article 3(b) that States shall impose sanctions upon “persons or institutions that knowingly acquire or deal in stolen or illicitly imported cultural property”;

b. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>188</sup> (article 4 and article 28) and its *Second Protocol*<sup>189</sup> (article 15) bind States Parties to prohibit and prevent any form of vandalism or extensive destruction of cultural property in the event of an armed conflict (as well as to make protected cultural property the object of an attack), and to establish as criminal offences under domestic law these conducts;

c. the *Convention on the Protection of the Underwater Cultural Heritage*<sup>190</sup> (articles 1, 3, and 12) states that the States Parties “may take all practicable measures” to “prevent any immediate danger to underwater cultural heritage, whether arising from human activity”, and that “each State Party shall impose sanctions for violations of measures it has taken” to implement the convention itself, sanctions which “shall be adequate in severity to be effective” and “to discourage violations”;

<sup>187</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>188</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>189</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>190</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

d. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>191</sup> (articles 1, 3 and 12) states that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” and in *Appendix III* lists as convention offences, “receiving of cultural property” resulting from one of the listed offences “and regardless of the place where the latter was committed”; “handling cultural property obtained as the result of an offence against property other than theft”; “acquisition in a grossly negligent manner of cultural property obtained as the result of theft or of an offence against property other than theft”; “destruction or damaging of cultural property of another person”; acquisition, concealment or alienation of cultural property fortuitously discovered and not duly declared, or illicitly excavated; violation of legal provisions “which make modifications to a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, conditional on prior authorisation by the competent authorities” or “according to which the owner or the possessor of a protected monument of architecture, a protected movable monument, a protected monumental ensemble or a protected site, is held to preserve it in adequate condition or to give notice of defects which endanger its preservation”;

e. during the meeting of the UNODC Expert group *on protection against trafficking in cultural property* several speakers recommended that States shall criminalize forgery of cultural property, as well as aiding and abetting, receiving and requesting illicitly trafficked cultural property<sup>192</sup>;

f. the UN Commission on Crime Prevention and Criminal Justice in its *Draft resolution of 2011, on Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>193</sup>, invited Member States to criminalize damage, removal and destruction of cultural property.

122. [CONTENT:] States should consider introducing specific criminal offences (or at making them aggravating circumstances) in order to punish the illicit dealing in trafficked, illicitly exported or imported, stolen, looted or illicitly excavated movable cultural property, including its receiving, acquisition and concealment. States may consider punishing the negligent acquisition of such cultural property. The knowledge or intent may be inferred from objective factual circumstances (see Guideline 22).

123. States should also consider criminalizing the forgery of movable cultural property. Stiffer sanctions should be considered when the forgery leads to the alteration or damage of an authentic cultural property.

124. States should also consider introducing a specific criminal offence (or at least a specific aggravating circumstance) in order to punish the damage of both movable and immovable cultural property. In any case they should introduce adequate criminal sanctions that take into account the harm done to cultural heritage. In particular, it is advisable to punish the most harmful type of conduct with deprivation of liberty, in addition to the imposition of a fine and/or professional disqualification (where feasible). In any event, the punishment should reflect the value of the cultural property involved and the economic capacity of the offender. States should allow courts to award damages or compensation for the harm suffered as a consequence of the offence.

125. States should evaluate the possibility of making the most serious forms of damaging (i.e., acts which causes the loss or irreparable damage of a work of art which is part of mankind’s cultural heritage, or the loss or irreparable damage of a considerable part of a significant collection of cultural properties) into “serious offences” as defined by article 2(b) of the *Convention against Transnational Organized Crime*<sup>194</sup>.

<sup>191</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>192</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>193</sup> See E/2011/30 E/CN.15/2011/21.

<sup>194</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

126. All the above mentioned criminal offences should be reflected in a harmonized manner in all relevant national legislation.

127. According to their national criminal legislation and taking into consideration the proportionality and advisability of such measures, States may choose either to introduce specific criminal offences, or to provide for aggravating circumstances to the offences of receiving, concealing, aiding and abetting, forgery and damaging cultural property.

**GUIDELINE 21. States should consider introducing in their criminal legislation an offence of conspiracy or participation in an organized criminal group for trafficking in cultural property and related offences.**

128. [RATIONALE:] States should consider adopting all necessary measures in order to ensure that any conspiracy or criminal organization intended to commit trafficking in cultural property or one of the related offences are sanctioned.

129. The introduction of an offence of conspiracy for trafficking in cultural property and related offences could assist in addressing the frequent involvement of organized criminal groups, or organized operators, in the illicit market of cultural property. It could also enhance prevention of conduct greatly harmful to cultural heritage and strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Moreover, the adoption by States of such legislation across the board can facilitate investigative and judicial cooperation in fighting the crime. In particular, it can reduce incidents of refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality. Lastly, it will facilitate the application of the *Convention against Transnational Organized Crime*<sup>195</sup> to the most serious offences against cultural property.

[BACKGROUND:] Several relevant international documents and conventions recommend or provide for criminalizing conspiracy for committing trafficking and related offences against cultural property. In particular:

a. the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>196</sup> expressly states in articles 2(c) and 3(c) that States shall impose sanctions upon “persons or institutions that enter into international conspiracies to obtain, export or import movable cultural property by illicit means”;

b. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>197</sup> (articles 1, 3 and 12) states that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” and in *Appendix III* lists as “offences” relevant to conventional provisions “any understanding followed by overt acts, between two or more persons, with a view to committing any of the offences” of theft and robbery of cultural property, or receiving of stolen cultural property;

c. the *Convention against Transnational Organized Crime*<sup>198</sup> (article 5) provides for the criminalization of any participation in an organized criminal group and any conduct of organizing, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group.

<sup>195</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>196</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>197</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>198</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

130. [CONTENT:] States should consider introducing a criminal offence of conspiracy to traffic in cultural property and related offences or extend the existing offence of conspiracy to include conspiracy to traffic cultural property.

131. States should also introduce adequate penalties that take into account the harm that is done to cultural heritage by such offences. In particular, it is advisable to introduce deprivation of liberty as a sanction, in addition to a fine and/or professional disqualifications (where feasible), when an organized criminal group is involved. States should also ensure that such offences are harmonised as far as possible in all relevant national legislation.

132. None States parties should also consider becoming parties to the *Convention against Transnational Organized Crime*<sup>199</sup> in order to better combat organized crime relating to cultural property.

**GUIDELINE 22.** *States should consider making it possible to infer a perpetrator's knowledge when the movable cultural property is registered as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing in a publicly accessible database.*

➔ *See also Guideline 2 on databases.*

➔ *See also Guideline 5 on codes of conduct.*

133. [RATIONALE:] States should empower their courts, where cultural property has been registered as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing in one or more publicly accessible databases, to infer knowledge of the fact that the cultural property had been illicitly obtained on a person in whose possession such cultural property is found. A “publicly accessible” database is one that is open to consultation by the public at large, or one that is accessible through a system of registrations or passwords in the case of professional operators of cultural institutions or dealers in the art and antiques market.

134. The burden of proof on the public prosecutor will be simplified, without introducing a problematic strict liability. Moreover, professional operators’ caution in dealing with cultural property will be fostered and transparency in the art and antiques market will be increased, so enhancing prevention of conduct greatly harmful to cultural heritage.

[BACKGROUND:] The exclusion of a good faith defence for the owner or holder of a cultural property which is registered as stolen, missing or illicitly exported is recommended or provided for in some relevant international documents and conventions. In particular:

a. the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>200</sup> expressly states in article 2 that States shall “take the measures necessary to ensure that the purchaser of stolen movable cultural property which is listed on the international database is not considered to be a purchaser who has acquired such property in good faith”, as well as “to ensure that a purchaser of imported movable cultural property which is not accompanied by an export certificate issued by

<sup>199</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>200</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

the other State Party [...] shall not be considered to be a person who has acquired the movable cultural property in good faith”;

b. the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>201</sup> (article 4.4) defines the concept of “due diligence” in civil law matters : “In determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances”.

c. the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>202</sup> (article 6), while prescribing that the good faith possessor of a cultural property which is revealed to have been illicitly exported is entitled to payment of fair and reasonable compensation, states that “in determining whether the possessor knew or ought reasonably to have known that the cultural object had been illegally exported, regard shall be had to the circumstances of the acquisition, including the absence of an export certificate required under the law of the requesting State”.

d. the UNESCO *International Code of Ethics for Dealers in Cultural Property* establishes professional practice intended to distinguish cultural property being illicitly traded from that in licit trade, and to eliminate the former from such professional activities.

135. [CONTENT:] States should consider implementing a system of national and international databases of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property. Such databases should be publicly accessible, either by the general public, or by functionaries and employees of cultural institutions, as well as auctioneers, dealers in art and antiques and other professional operators in the art and antiquities market, at least by a system of registrations or passwords. Where such a database exists (INTERPOL’s Stolen Works of Art database), States should consider ensuring a systematic information supply with a view to data integration (see also Guideline 2).

136. States could introduce in their criminal legislation a presumption of knowledge of the illicit origin of a cultural property when the same property has been registered as trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing in such a database. It is also advisable to exclude, on the same ground, a good faith defence in civil or administrative proceedings.

137. States should consider introducing a legal requirement that the importation of cultural property be always accompanied by a valid export certificate issued by the State of origin of the cultural property. States should also consider introducing in their criminal legislation a presumption of knowledge of the illicit origin of a cultural property, when the same property was imported without a valid export certificate issued by the State of origin.

138. It is also advisable to exclude a good faith defence in civil or administrative proceedings, when the movable cultural property was imported without a valid export certificate issued by the State of origin.

**GUIDELINE 23. States may consider introducing in their legislation an offence for the violation of the obligation to report suspected cases of trafficking and related offences against cultural property.**

<sup>201</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>202</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

→ *See also Guideline 6.*

139. [RATIONALE:] States should consider introducing sanctions, either criminal or administrative in nature, for the violation of the obligation to report suspected cases of trafficking in cultural property, or related offences, by personnel of cultural institutions, professional dealers in art and antiquities and web-based auctioneers.

140. The introduction of such an offence could enhance the effectiveness of the prescribed obligation to report suspicious dealings on cultural properties by personnel of cultural institutions, professional dealers in art and antiquities and web-based auctioneers. Another positive effect could be to foster professional operators' caution in dealing with cultural property, and so increase transparency in cultural institutions' acquisition policies, as well as in the art and antiques market. Such a provision could also enhance prevention of conduct greatly harmful to cultural heritage and strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Moreover, the adoption by States of such legislation across the board can facilitate investigative and judicial cooperation amongst States to fight trafficking and related offences against cultural property. In particular, it could reduce incidents of refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality.

[BACKGROUND:] There are some precedents for such obligations to report. In particular, some States (such as Japan) already possess legislative prescriptions to report at least on suspected fraudulent cultural items<sup>203</sup>.

141. [CONTENT:] States should consider introducing the obligation to report suspicious cultural properties or operations on functionaries and personnel of museums and other cultural institutions, dealers in art and antiquities and web-based auctioneers or internet providers.

142. States could consider directly entrusting the Central National Authority proposed in Guideline 4 with the task of collecting and elaborating the information provided by functionaries and personnel of museums and other cultural institutions, dealers in art and antiquities and web-based auctioneers or internet providers.

143. It is advisable to punish the violation of such obligation with proportionate, effective and dissuasive sanctions, either administrative or criminal in nature. In particular, States should introduce criminal sanctions for violations of the obligation to report by public officials, civil servants or public employees; they should also provide for professional disqualification as sanction for the violation of such obligation, whenever proportionate and feasible.

144. If the adopted sanction is (or is also) a pecuniary one, States should make it proportional to the value of the cultural property involved, and also reflective of the economic capacity of the offender. Such offence or offences should be uniformly reflected in all relevant national legislation.

***GUIDELINE 24. States may consider introducing in their legislation an offence for the violation of the obligation to report the discovery of archaeological sites, archaeological finds or other object of relevant cultural interest.***

<sup>203</sup> See E/CN.15/2010/4.

145. [RATIONALE:] The introduction of an obligation to report the discovery of sites or objects of relevant cultural interest, with a related offence, either administrative or criminal in nature, for the violation of the same obligation, could give an advanced protection to unknown and unregistered cultural sites or objects from looting or pillaging.

146. It could also strengthen public awareness of the relevant value of cultural heritage and of the harm caused by crimes against it. Moreover, it could foster an assumption of responsibility by operators and the general public in dealing with cultural sites or properties, especially in case of chance discoveries, and enhance the prevention of trafficking and other related offences greatly harmful to cultural heritage. Lastly, the adoption by States of such legislation across the board can facilitate investigative and judicial cooperation amongst States in trafficking and related offences against cultural property. In particular, it can reduce incidents of refusal of requests for extradition or, more generally, international cooperation, due to lack of dual criminality.

[BACKGROUND:] There are some precedents for such obligations to report. In particular:

a. the *Convention on the Protection of the Underwater Cultural Heritage*<sup>204</sup> states that the States Parties “shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage [...] the national or the master of the vessel shall report such discovery or activity”, and that “each State Party shall impose sanctions for violations of measures it has taken” to implement the *Convention* itself, sanctions which “shall be adequate in severity to be effective” and “to discourage violations”<sup>205</sup>;

b. the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>206</sup> (articles 1, 3 and 12) states that each State Party shall take all necessary measures for “adequate sanctioning” of any “act or omission that affects cultural property” and *Appendix III* lists as “offences” relevant to conventional provisions “violation of the legal provisions of a Party according to which the person who fortuitously discovers archaeological property is held to declare such property to the competent authorities”, as well as “violation of the legal provisions of a Party, or of an excavation licence issued by the competent authorities, according to which the person who discovers archaeological property as a result of duly authorised excavations is held to declare such property to the competent authorities”;

c. the *European Convention on the Protection of the Archaeological Heritage (Revised)*<sup>207</sup> (article 2) binds States Parties to make provisions, within their legal system, for “the mandatory reporting to the competent authorities by a finder of the chance discovery of elements of the archaeological heritage”;

d. the UNODC Expert group *on protection against trafficking in cultural property* stated that States shall “encourage their citizens to report finds and discourage speculative looting”<sup>208</sup>.

147. [CONTENT:] States should consider introducing for any person an obligation to report the discovery of archaeological sites, archaeological finds or other objects of cultural interest, and to punish the violation of such obligation with proportionate, effective and dissuasive sanctions, either administrative or criminal in nature.

148. States should, in particular, consider bringing only administrative sanctions for violations of the obligation to report by ordinary citizens, and introducing proportionate, effective and dissuasive sanctions, either administrative or criminal in nature, for the

<sup>204</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>205</sup> See article 9, article 11 and article 17, United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>206</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>207</sup> Council of Europe, *European Treaty Series*, No. 143.

<sup>208</sup> See UNODC/CCPCJ/EG1/2009/2.

violation of the obligation to report by professional archaeologist, members of cultural institutions or professional dealers in art and antiques.

149. States should also evaluate the possibility of introducing criminal sanctions for the violation of such obligation to report by public officials, civil servants or public employees, particularly where they are members of cultural institutions or public authorities or agencies charged with the protection of cultural heritage. In particular, it could be advisable to introduce professional disqualification as sanction for the violation of the obligation to report whenever proportionate and feasible.

150. If the adopted sanction is (or is also) a pecuniary one, States should make it proportional to the value of the cultural property involved, and also reflective of the economic capacity of the offender. Such offence or offences should be uniformly reflected in all relevant national legislation.

### Section III. Criminal sanctions

**GUIDELINE 25. States should consider providing proportionate, effective and dissuasive sanctions for the aforementioned criminal offences.**

151. [RATIONALE:] States should consider introducing penalties which are proportionate to the seriousness of each offence against cultural property that they will provide for in their criminal legislation. States should consider making such criminal sanctions adequate in severity to act as a deterrent to potential offenders and to encourage compliance. States should enforce criminal offences against cultural property and the related sanctions so as to ensure their effectiveness. The introduction of new criminal offences specific for combating crimes against cultural property would be useless and merely expressive, if they are not accompanied by the provision of proportionate, effective and dissuasive sanctions. In particular, sanctions which are not reflective of the seriousness of the offence by lacking in severity are doomed to be ineffective in dissuading potential offenders, while sanctions which are excessively severe can also be oppressive and counter-productive.

[BACKGROUND:] Some relevant international documents and conventions expressly underline the necessity that sanctions for trafficking and related offences against cultural property be chosen and shaped in order to be proportionate, effective and dissuasive. In particular:

a. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>209</sup>, and particularly the related *Second Protocol*<sup>210</sup> (article 15), with regard to crimes against cultural property committed in the event of armed conflict, prescribe to States Parties to punish the enlisted offences with “appropriate penalties”;

b. the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>211</sup> (articles 6(b), 7(b) 8 and 10) provides for States Parties to impose either criminal or administrative sanctions for the illicit export and import of cultural properties (implicitly, States shall consider choosing the former at least for the most serious offences);

<sup>209</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>210</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>211</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

c. the *Convention on the Protection of the Underwater Cultural Heritage*<sup>212</sup> (article 17) provides for States Parties to impose sanctions “adequate in severity to be effective in securing compliance” for violations of the measures they have taken to implement the convention itself;

d. the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>213</sup> (article 12) provides for States Parties to take all “necessary measures for adequate sanctioning” of offences against cultural property;

e., according to Recommendation 26 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>214</sup>, EU Member States shall consider providing for sanctions to be imposed when a cultural heritage institution, or collector, owner or dealer has acquired a tainted object, which could have an effect on deterring illicit traffickers from depriving a country of origin from its cultural heritage. This effect shall be studied in relation to the different legal systems in each Member State;

f. both the *Convention against Transnational Organized Crime*<sup>215</sup> (article 11) and the *Convention against Corruption*<sup>216</sup> (article 30), in relation to participation in an organized criminal group, laundering of proceeds of crimes and corruption (which are often mingled or instrumental to trafficking in cultural property and related offences), provide for States to impose “sanctions that take into account the gravity of that offence”;

g. the UNODC Expert group *on protection against trafficking in cultural property* expressly stated that “States should have legislation that is appropriate for criminalizing trafficking in cultural property”<sup>217</sup>;

h. the conference of UN Member States in the *Salvador Declaration* urged States to “develop effective legislation to prevent, prosecute and punish” any offence against cultural property<sup>218</sup>.

152. [CONTENT:] States should consider introducing criminal sanctions which are proportionate to the seriousness of each offence, taking into account the harm caused to cultural heritage and the degree of culpability of the offender. States should allow courts to award damages for compensation of the harm suffered as a consequence of the offence.

153. The sanctions should be adequate in severity in order to be effective in ensuring compliance and dissuading potential offenders.

154. States should always choose the least oppressive amongst sanctions which are comparable by their deterrence and effectiveness, and should take particular care in ensuring the proportionality of fines, which shall be reflective not only of the seriousness of the offence, but also of the cultural values involved (even if not harmed) and to the economic capacity of the offender. Moreover, they should take appropriate measures in order to promote the reintegration into society of persons convicted for an offence against cultural property.

**GUIDELINE 26. States may consider adopting custodial sanctions for some selected criminal offences, so as to meet the standard required by article 2(b) of the Convention against Transnational Organized Crime for “serious crimes”.**

155. [RATIONALE:] States should consider adopting custodial sanctions as penalties whether proportionate to the seriousness of the offence against cultural property. In

<sup>212</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>213</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>214</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>215</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>216</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>217</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>218</sup> See A/CONF.213/18, chap. I, resolution 1.

particular, States may consider introducing for the most serious offences a maximum deprivation of liberty of at least four years, or a more serious penalty, so as to meet the standard required by article 2(b) of the *Convention against Transnational Organized Crime*<sup>219</sup>.

156. Such a choice would provide sanctions adequate for the most serious offences against cultural property and leading to the enforceability of the *Convention against Transnational Organized Crime*<sup>220</sup> (at least for States Parties) with regard to serious crimes against cultural property, where the offence is transnational in nature and involves an organized criminal group<sup>221</sup>.

[BACKGROUND:] Some relevant international documents expressly promote the adoption of custodial sanctions for trafficking or other serious offences against cultural property, so as to meet the standard required by article 2(b) of the *Convention against Transnational Organized Crime*<sup>222</sup>. In particular:

a. the UNODC Expert group *on protection against trafficking in cultural property* expressly invited States to consider making trafficking in cultural property a “serious crime” in accordance with article 2(b) of the *Convention against Transnational Organized Crime*<sup>223</sup>;

b. the conference of UN Member States in the *Salvador Declaration* urged States to “to strengthen international cooperation and technical assistance in this area”, bearing in mind the existing international instruments, including the *Convention against Transnational Organized Crime*<sup>224</sup>;

c. the Conference of the Parties to the Convention in its *Resolution 5/7* of 2010<sup>225</sup> encouraged States to make full use of the *Convention against Transnational Organized Crime* in order to combat criminal offences against cultural property, and particularly invited Member States to consider such offences as serious crimes according to article 2(b) of the same convention;

d. the Commission on Crime Prevention and Criminal Justice, in its *Draft resolution* of 2010, on *Crime prevention and criminal justice responses to protect cultural property*<sup>226</sup>, as well as in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>227</sup>, invited Member States to consider trafficking in cultural property a serious crime, as defined in article 2(b) of the *Convention against Transnational Organized Crime*.

157. [CONTENT:] States may consider adopting custodial sanctions, so as to meet the standard required by article 2(b) of the *Convention against Transnational Organized Crime*<sup>228</sup> for “serious crime”, for the most serious offences against cultural property, such as trafficking in cultural property, theft of cultural property, looting of archaeological or other cultural sites, and the most serious forms of damage to monuments or cultural property.

**GUIDELINE 27. States should consider adopting bans and disqualifications as criminal sanctions whenever possible.**

<sup>219</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>220</sup> *Ibid.*, vol. 2225, No. 39574.

<sup>221</sup> See article 3, United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>222</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>223</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>224</sup> See A/CONF.213/18, chap. I, resolution 1.

<sup>225</sup> See CTOC/COP/2010/17.

<sup>226</sup> See the Commission on Crime Prevention and Criminal Justice, *Report on the nineteenth session (4 December 2009 and 17-21 May 2010)* (E/2010/30 E/CN.15/2010/20).

<sup>227</sup> See the Commission on Crime Prevention and Criminal Justice, *Report on the twentieth session (3 December 2010 and 11-15 April 2011)* (E/2011/30 E/CN.15/2011/21).

<sup>228</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

158. [RATIONALE:] States should consider adopting as criminal sanctions for offences against cultural property not only deprivation of liberty and fines, but also bans or disqualifications, such as withdrawal of licenses, suspension or ban from holding public office or employment, suspension or ban from holding the position of CEO in a corporation. For this purpose, States should consider implementing a system of dealer licensing, where they do not have one yet.

159. The use of bans and disqualifications as criminal sanctions for offences against cultural property could bring several advantages. Firstly, as trafficking and related offences are often perpetrated by professionals, who avail themselves of the same channels of trade for both licit and illicit dealing in cultural property, a professional disqualification may be a more dissuasive sanction than a fine or a short custodial sanction. Moreover, as the position of the agent in a cultural institution, or in an auction house, or other firm operating in the art and antiquities market, or the possession of a license or authorization, is often instrumental to the perpetration of offences against cultural property, to suspend or interdict a person from such office or position, or to withdraw (or deny) such license or authorization, could effectively prevent further offences by the same person.

[BACKGROUND:] Disqualifications have already been taken into account as criminal sanctions:

a. in the *Convention against Corruption*<sup>229</sup>, for corruption, bribery and related offences (which are often connected or instrumental to crimes against cultural property), “where warranted by the gravity of the offence”<sup>230</sup>;

b. in the *Convention against Transnational Organized Crime*<sup>231</sup>, as preventive measures to be imposed on persons convicted of offences related to organized crime (which is often the case in trafficking in cultural property), in particular in relation to corporations<sup>232</sup>.

160. [CONTENT:] States should consider adopting as criminal sanction, alone or in addition to custodial or monetary sanctions, the prohibition of certain activities or the withdrawal of licenses or authorizations for any operator in the art and antiquities market who commits a crime against cultural property, whenever the law requires a license or authorization for his or her activity. Such suspension or withdrawal may be temporary, or permanent for more serious offences or for recidivists.

161. States should also consider adopting as criminal sanction, alone or in addition to custodial or monetary sanctions, the suspension or prohibition from holding public office or employment where the offender is a public officer or employee (especially of a public cultural institution or agency charged with protection of cultural heritage). Such disqualification should be usually temporary, but could be permanent for more serious offences or for recidivists.

162. States should consider adopting as criminal sanction, alone or coupled with custodial or monetary sanctions, the suspension or prohibition from further holding the position of CEO in a corporation of any person who had used such position to commit a crime against cultural property.

163. States may choose to adopt disqualifications either as autonomous criminal sanctions, or as additional ones, according to their national legislation, taking into account

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<sup>229</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>230</sup> See article 30 and article 34, United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>231</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>232</sup> See article 31, United Nations, *Treaty Series*, vol. 2225, No. 39574.

the issues of proportionality. States may consider adopting disqualifications both as criminal and as administrative sanctions, provided that the latter are imposed after a trial by a court.

#### Section IV. Corporate liability

**GUIDELINE 28. States should consider introducing (or extending) liability (criminal, administrative or civil in its nature) of corporations or legal persons to the aforementioned offences against cultural property, where committed on their behalf.**

164. [RATIONALE:] Liability of corporations and other legal persons, which participate in an offence against cultural property, is advisable because of several considerations. Firstly, offences against cultural property often involve organizations (either public ones, such as museums, libraries, and other cultural institutions, or private ones, such as private collections or cultural institutions and corporations operating in the art and antiques market). The same organization may operate both on the licit and on the illicit market of cultural property, so increasing the opaqueness of the market itself. Moreover, the individual agents often act under pressure from the organization they belong to, either explicitly exerted (i.e. orders, directions, rewards, sanctions, etc.), or implicitly exerted (organizational culture). The introduction of an organizational liability could therefore force cultural institutions and corporations to assume responsibility and foster a culture of compliance with laws and regulations related to cultural heritage protection.

[BACKGROUND:] Legal persons liability for offences committed on behalf of the organization is already provided for:

a. in the *Convention against Transnational Organized Crime*<sup>233</sup>, for participation in serious crimes involving an organized criminal group, as well as for participation in the organized criminal group itself, laundering of proceeds of crime, corruption and obstruction of justice (some of which are offences frequently related to trafficking in cultural property)<sup>234</sup>;

b. in the *Convention against Corruption*<sup>235</sup> (article 26), for participation in the offences of bribery (both in the public and in the private sector), trading in influence, abuse of functions, embezzlement or misappropriation (both by a public official and by a private manager or employee), illicit enrichment, laundering of proceeds of crime, concealment and obstruction of justice (most of which are offences frequently related to trafficking in cultural property).

165. [CONTENT:] States should consider introducing (or extending, where they already exist) corporate liability for any offence against cultural property which is committed on behalf of a corporation or legal person. In addition, States should consider choosing amongst criminal, administrative or civil liability according to their national legislation, and imposing adequate sanctions for the corporation or legal person. Moreover, States should ensure that such organizational liability will be without prejudice to the criminal liability of the natural persons who have committed the offence, and also that such organizational liability will arise even if the natural persons who actually carried out the act are not identified or punishable, provided that the offence itself is recognizable as having been committed on behalf of the corporation or legal person.

166. States may consider providing for mitigation or exemption of liability, when the corporation or legal person has actively and effectively cooperated with law enforcement

<sup>233</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>234</sup> See article 10, United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>235</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

agencies, and/or has taken such measures (for example, corporate guidelines, codes of conduct, protocols for auditing, etc.) to prevent future commission of offences against cultural property, and provided that the illegally obtained cultural property has been handed over to law enforcement agencies, or returned to the legitimate owner.

**GUIDELINE 29. *States should consider introducing proportionate, effective and dissuasive sanctions for corporate offences against cultural property, including fines and bans or disqualifications, where possible.***

167. [RATIONALE:] States should consider introducing sanctions which are proportionate to the seriousness of the offence against cultural property committed on behalf of the corporation or legal person. States should consider making such sanctions adequate in severity in order to dissuade potential corporate offenders and to encourage compliance. States should consider shaping such sanctions so as to take into account the peculiarities of the organizations operating with cultural properties. The introduction of liability of corporations and other legal persons for offences against cultural property would be useless and merely expressive, if it is not coupled with the provision of proportionate, effective and dissuasive sanctions. It is important to note that sanctions which are not reflective of the seriousness of the offence by lacking in severity are likely to be ineffective in dissuading potential offenders. On the other hand, sanctions which are excessively severe are oppressive and counter-productive in that they result in creating an adversarial market subculture, encourage intolerance to rules and noncompliance.

[BACKGROUND:] The adequacy of sanctions for offences committed on behalf of a corporation or legal person is already provided for:

a. in the *Convention against Transnational Organized Crime*<sup>236</sup>, (article 10) and the *Convention against Corruption*<sup>237</sup> (article 26) both bind States Parties to “ensure that legal persons held liable in accordance with” conventional provisions “are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions”<sup>238</sup>;

c. in Recommendation 26 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>239</sup>, EU Member States shall consider providing for sanctions to be imposed when a cultural heritage institution, or collector, owner or dealer has acquired a tainted object, which could have an effect on deterring illicit traffickers from depriving a country of origin from its cultural heritage. This effect shall be studied in relation to the different legal systems in each Member State.

168. [CONTENT:] States should consider introducing criminal, administrative, or civil sanctions according to their national legislation. These sanctions should be proportionate to the seriousness of the offence committed on behalf of the organization, evaluated both in relation to the harm caused to cultural heritage (or other values or rights involved), and in relation to the “culpability” of the organization (i.e. the role played by the corporation or legal person in determining, facilitating or allowing the commission of the offence by the natural persons).

169. States should also consider introducing sanctions adequate in severity (within the limit of proportionality in terms of the seriousness of the offence), so as to ensure their

<sup>236</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>237</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>238</sup> See article 10, United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>239</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

effectiveness in dissuading potential corporate offenders. States should always choose the less oppressive of sanctions which are comparable by their deterrence and effectiveness, and are proportional to the seriousness of the offence and take into account the cultural values involved (even if not harmed) and to the economic capacity of the culpable organization.

170. Moreover, States should consider adopting as sanctions for corporate offenders, whenever possible, banning and prohibition of activities, disqualifications and/or withdrawal of licenses or authorizations, either alone or in addition to monetary sanctions. The disqualification or withdrawal should ordinarily be temporary, but could be permanent for more serious offences or for recidivist organizations.

171. States may consider providing for mitigation of sanctions, when the corporation or legal person has actively and effectively cooperated with law enforcement agencies, and/or has taken such measures (for example, corporate guidelines, codes of conducts, protocols for auditing, etc.) to prevent future commission of offences against cultural property, and where the cultural property which was the object of the offence, is handed over to law enforcement agencies or returned to the legitimate owner.

## Section V. Seizure and confiscation

**GUIDELINE 30.** *States should consider introducing search, seizure and confiscation of cultural property which is the object of illicit trafficking or other related offences, and to ensure their return, restitution and repatriation.*

172. [RATIONALE:] States should adopt such measures as may be necessary to enable confiscation of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, or illicitly dealt in cultural properties which are the object of an offence. States should also adopt such measures as may be necessary to enable the search and seizure of any cultural object mentioned above. Confiscation shall be aimed, whenever possible, at return, restitution and repatriation of the cultural property to the legitimate owner.

173. Seizure and confiscation are necessary measures in the fight against crimes against cultural property in that it hits where it hurts the criminals most – their acquisitions and profits. These actions will take away the cultural property, protect them from further offences and damage and facilitate return to legitimate owners.

[BACKGROUND:] Seizure and confiscation of cultural properties suspected or ascertained as objects of an offence have been taken into account:

a. by the UN *Convention against Transnational Organized Crime*<sup>240</sup> (article 12) which states that: “1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences covered by this Convention [...] 2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation”;

b. by the *Convention on the Protection of the Underwater Cultural Heritage*<sup>241</sup> (article 18) which binds each State Party to “take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity” with the convention itself;

<sup>240</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>241</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

c. by the Economic and Social Council *Resolution* 2008/23, which urged Member States to “protect cultural property and prevent trafficking in such property by introducing appropriate legislation, including, in particular, procedures for the seizure, return or restitution of cultural property”;

d. by the UNODC Expert group *on protection against trafficking in cultural property*, which invited States, for the purpose of providing each other with the widest possible mutual legal assistance in protection against trafficking in cultural property, including with regard to confiscation, to endeavour to use the relevant existing instruments, including the *Convention against Transnational Organized Crime*<sup>242</sup>;

e. by the Commission on Crime Prevention and Criminal Justice, which, in its *Draft resolution of 2011 on Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>243</sup>, invited all Member States to protect cultural property and prevent trafficking in such property by introducing appropriate legislation, including, in particular, procedures for its seizure and confiscation, recovery, and return;

f. less directly, by the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>244</sup> (article 2), which states that each State shall “take the necessary measures to recover and return, at the request of the other State Party, any movable cultural property” which has been stolen or illicitly exported, so implying the use of measures such as freezing, seizure and confiscation;

g. similar generic provisions are included also in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>245</sup> (article 7);

h. by the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>246</sup> (article 8), which allows resort to “the provisional, including protective, measures available under the law of the Contracting State where the object is located even when the claim for restitution or request for return of the object is brought before the courts or other competent authorities of another Contracting State”, for the purpose of the claim;

i. at regional level, according to Recommendation 15 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010<sup>247</sup>, States shall be very cautious in providing in their legislation immunity from seizure guarantees for international art loans, in order to avoid granting such a guarantee to cultural properties which may have been stolen or illicitly exported.

174. [CONTENT:] States should adopt such measures as may be necessary to enable confiscation of cultural objects which have been trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, or illicitly dealt in. “Confiscation” shall mean the permanent deprivation of property by order of a court or other competent authority.

175. States may choose between administrative and criminal confiscation according to their national legislation, as well as to considerations of proportionality and advisability. States may also introduce both criminal and administrative confiscation. Moreover, States should consider taking all necessary measures to make confiscation as a sanction *per se*, either criminal or administrative in nature.

176. States should also adopt such measures as may be necessary to enable the search and seizure of any suspected trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, or illicitly dealt in cultural property, for the purpose of eventual confiscation. “Seizure” shall mean an urgent and swift precautionary measure aimed at temporarily prohibiting the transfer, conversion, disposition or movement of a cultural

<sup>242</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>243</sup> See E/2011/30 E/CN.15/2011/21.

<sup>244</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>245</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>246</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>247</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

property, or at temporarily assuming custody or control of a cultural property, to be issued, at the instance of any competent law enforcement agency, by a court or other competent authority.

177. States should consider taking all necessary measures to aim confiscation at return, restitution and repatriation of the cultural property to the legitimate owner (either another State, or a cultural institution, or a private individual), whenever identifiable.

178. States should exercise caution in providing in their legislation for immunity from seizure guarantees for international art loans, in order to avoid granting such a guarantee to cultural properties which may have been trafficked, illicitly exported or imported, stolen, looted or illicitly excavated or illicitly dealt in.

**GUIDELINE 31. States may consider the possibility of requiring that the alleged offender, the owner or the holder (if different), demonstrates the lawful origin of suspicious cultural property which is the object of seizure or confiscation.**

179. [RATIONALE:] States may consider the possibility of requiring that the alleged offender, the owner or the holder (if different from the former), demonstrates the lawful origin of suspicious cultural property which is the object of seizure or confiscation. Such a requirement is necessary because it is often difficult to trace the precise origin of a cultural property, particularly if it is unregistered. This will also force potential buyers and dealers to ascertain the legitimate origin of cultural properties they intend to acquire or deal in. The requirement will be a valuable tool for law enforcement and prosecutors.

[BACKGROUND:] The possibility of requiring that the alleged offender demonstrates the lawful origin of a suspicious cultural property has been taken into account:

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which invited States to consider allowing cultural property “to be seized when those in possession of the property cannot prove the licit provenance of the objects or that they have a reasonable belief in the licit provenance of the objects”<sup>248</sup>;

b. by the *Convention against Transnational Organized Crime*<sup>249</sup> (article 12), which provides for States Parties to consider “the possibility of requiring that an offender demonstrate the lawful origin of [...] alleged proceeds of crime or other property liable to confiscation, to the extent that such requirement is consistent with the fundamental principles of their domestic law and with the nature of the judicial and other proceedings”;

c. by the *Convention against Corruption*<sup>250</sup> (article 31), which provides for States Parties to consider “the possibility of requiring that an offender demonstrate the lawful origin of [...] alleged proceeds of crime or other property liable to confiscation, to the extent that such requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings”.

180. [CONTENT:] States may consider the possibility of requiring that the alleged offender, the owner or the holder (if different from the former), demonstrates the lawful origin of a suspect cultural property, whenever the seizure is required by a law enforcement agency, to the extent that such a requirement is consistent with the principles of their domestic law and procedure.

181. States may also consider the possibility of requiring that the alleged offender, the owner or the holder (if different from the former), demonstrates the lawful origin of a

<sup>248</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>249</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>250</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

suspect cultural property, whenever confiscation is required by a law enforcement agency, to the extent that such a requirement is consistent with the principles of their domestic law and procedure.

**GUIDELINE 32. *States should consider introducing confiscation of the proceeds of the offence, or of property of equivalent value to such proceeds.***

182. [RATIONALE:] States should consider introducing in their legislation confiscation of the proceeds of crime, in order to deprive the offender of any profits deriving from the offence against cultural property, including equivalent sums or assets. The provision for a confiscation as extended as possible to any proceeds of crime, direct or indirect, while taking away any benefit that may have come to the offender from the trafficking in cultural property or other related offence, is also a great preventative tool of the legal system, in that it also takes away the means by which the offender can engage in further crimes.

[BACKGROUND:] Confiscation of the proceeds of crime, even in the form of equivalent sums or assets, has been already taken into account:

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which invited States to consider confiscating the proceeds of crimes against cultural property, in case taking as a basis the *Convention against Transnational Organized Crime*<sup>251</sup>;

b. by the *Convention against Transnational Organized Crime*<sup>252</sup> (article 12) which provides for each State Party to take, “to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of proceeds of crime [...] or property the value of which corresponds to that of such proceeds”, as well as of “property, equipment or other instrumentalities used in or destined for use in offences”, and of “income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled”; moreover the same convention requires that States Parties take all necessary measures to ensure that “if proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to” seizure and confiscation “instead of the proceeds”, as well as to ensure that “if proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds”;

c. by the *Convention against Corruption*<sup>253</sup> (article 31), which provides for each State Party to take, “to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of proceeds of crime [...] or property the value of which corresponds to that of such proceeds”, as well as of “property, equipment or other instrumentalities used in or destined for use in offences”, and of “income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled”;

d. by the same *Convention against Corruption*<sup>254</sup> (article 31), which requires that States Parties take all necessary measures to ensure that “if such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to” seizure and confiscation “instead of the proceeds”, as well as to ensure that “if such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds”;

<sup>251</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>252</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>253</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>254</sup> *Ibid.*, vol. 2349, No. 42146.

e. less directly, by the *Convention on the Protection of the Underwater Cultural Heritage*<sup>255</sup> (article 17), which states that each State Party “shall deprive offenders of the benefit deriving from their illegal activities”.

183. [CONTENT:] States may consider taking all necessary measures to confiscate any property, equipment or instrument used in or destined for use in offences against cultural property, and to confiscate all proceeds of crime directly derived from offences against cultural property. If the proceeds of crime have been fully or partially transformed or converted into other assets or properties, States may consider confiscating the latter. If the previous forms of confiscation aren't possible, States may consider confiscating offender's properties the value of which corresponds to that of the proceeds themselves. If proceeds of crime have been intermingled with property lawfully acquired, States may consider confiscating such property up to the assessed value of the intermingled proceeds. Finally, States may consider confiscating also incomes or other benefits derived from the proceeds of crimes, or from other properties or assets into which proceeds of crimes have been transformed or converted.

**GUIDELINE 33. States may consider using confiscated economic assets for financing expenses for recovering and other prevention measures.**

184. [RATIONALE:] After having taken into account the interests of the victim, States may consider assigning at least a percentage of confiscated proceeds of crime (consisting in money or economic assets other than the cultural property) deriving from offences against cultural property, or from laundering of the proceeds of such offences, to finance expenses for recovering and other measures to prevent and combat trafficking in cultural property and related offences.

185. The introduction of legal provisions aimed at assigning some of the confiscated economic assets to a reinvestment in preventive measures could contribute to the much-needed funds for the most costly policies, such as implementation of digital inventories and databases, programs of market monitoring, specialized training for law enforcement agents and cultural institutions' personnel, sensitization programs and campaigns, etc.

[BACKGROUND:] Many States already allocate (at least part of) confiscated proceeds of crime to finance crime prevention measures. At international level, there are some precedents, such as:

a. the account designated for providing technical assistance to developing countries and countries with economies in transition in fighting against organized crime, within the United Nations Crime Prevention and Criminal Justice Fund, which is provided for in the *Convention against Transnational Organized Crime*<sup>256</sup> (article 30), that also encourage State Parties to contribute to it “a percentage of the money or of the corresponding value of proceeds of crime or property confiscated”;

b. the account designated for providing technical assistance to developing countries and countries with economies in transition in fighting against corruption, within the United Nations Crime Prevention and Criminal Justice Fund, which is provided for in the *Convention against Corruption*<sup>257</sup> (article 62), that also encourage State Parties to contribute to it “a percentage of the money or of the corresponding value of proceeds of crime or property confiscated”.

<sup>255</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

<sup>256</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>257</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

186. [CONTENT:] After having taken into account the interests of the victim, States may consider allocating either all or a percentage of monetary and other economic assets confiscated as proceeds of crime deriving from offences against cultural property to a special fund. States may use such fund for protection of cultural heritage, and, in particular, they may consider allocating at least a consistent part to finance expenses for recovering and other preventive measures and policies, such as setting up of digital inventories and databases, programs of market monitoring, specialized training for law enforcement agents and cultural institutions' personnel, sensitizing programs and campaigns, etc.

## Section VI. Investigations

**GUIDELINE 34.** *States should consider creating specialized law enforcement bodies or units for offences against cultural property, as well as providing specialized training for them.*

187. [RATIONALE:] States should consider creating law enforcement bodies or units specialized in preventing and trafficking in cultural property and related offences. Such judicial and investigative bodies or units shall be also specifically trained for this purpose.

188. The creation and training of specialized units for preventing and combating offences against cultural property is necessary because of the complexity of such offences, and the need for a deep knowledge of (both legal and illegal) art and antiquities market. In addition, it is necessary because of the peculiar nature of the objects involved, which requires adequate basic competences in art and antiques, and because of the frequent transnational character of such offences, which requires a good knowledge of foreign and international legislation, as well as the ability to cooperate with other national law enforcement agencies and international organizations. Finally, the creation and training of specialized investigative units for offences against cultural property is necessary in order to enhance the efficacy of investigations on offences against cultural property and the probability of recovering trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural properties.

[BACKGROUND:] There are several precedents of creation of specialized investigative units and/or specialized training in order to contrast specific typologies of crime, including offences against cultural property:

a. several States already have specialized investigative units (such as the Italian *Comando Carabinieri per la Tutela del Patrimonio Culturale* - Cultural Heritage Protection Command of Carabinieri - or the French OCBC, *Office Central de lutte contre le trafic des Biens Culturels* - Central office for combating trafficking in cultural property);

b. the *Convention against Transnational Organized Crime*<sup>258</sup> (article 36 and article 60) provides for each State Party to “initiate, develop or improve specific training programs for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control” of offences related to organized crime, including, in case, “secondments and exchanges of staff”;

c. the *Convention against Corruption*<sup>259</sup> (article 29) provides for States Parties to “ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement”, as

<sup>258</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>259</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

well as to provide such specialized units or agents with “appropriate training and resources to carry out their tasks”;

d. the UNODC Expert group *on protection against trafficking in cultural property* recommended that States provide, with the assistance of INTERPOL and the International Council of Museums, specialized training for police, customs and border services<sup>260</sup>;

e. the INTERPOL expert group on stolen cultural property, in the *Conclusions* of their 2010 meeting, invited INTERPOL and its member Countries to provide training opportunities on the fight against illicit trafficking in cultural property for law enforcement, judicial and other competent authorities<sup>261</sup>;

f. providing specialized training to police and customs agents, familiarizing them with the stolen works of art databases (such as INTERPOL’s one), and establishing a working network among them at the national, regional and international levels is one of the practical measures enlisted in UNESCO’s *Handbook*<sup>262</sup>.

189. [CONTENT:] States should consider creating (or implementing, where they already exist) specialized law enforcement bodies or units, including prosecutors, investigating magistrates, investigative police, customs and border police, and other personnel charged with the prevention, detection and control of offences related to cultural property. States should provide such bodies or units with adequate training on art and antiquities and related market (both legal and illegal), as well as on national and international legislation dealing with import and export of cultural property and related matters. States should provide such specialized units with adequate funding, personnel and equipment. States may further consider providing foreign language training to their officers and agents.

**GUIDELINE 35. States should consider enhancing coordination among law enforcement agencies in order to increase the probability of discovering and successfully investigating offences against cultural property.**

190. [RATIONALE:] States should consider taking all necessary measures to ensure effective coordination amongst the different specialized law enforcement bodies and units, as well as between them and all other relevant control agencies, such as border police and custom offices, other police forces, etc. To enhance coordination amongst the different law enforcement agencies can improve the probability of discovering, recognizing and recovering trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural properties. It can lead to a swifter and more effective circulation of relevant information amongst law enforcement agencies, and facilitate joint actions aimed at combating trafficking in cultural property and related offences. It could also enhance the efficacy of investigations on offences against cultural property, and improve prevention strategies of offences against cultural property and protection of cultural heritage.

[BACKGROUND:] Coordination amongst different law enforcement agencies (both at national and international level) has been positively evaluated:

<sup>260</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>261</sup> See the *Conclusions of the Seventh Meeting of the Interpol Expert Group (IEG) on Stolen Cultural Property*, held in Lyon on the 23-24 February 2010.

<sup>262</sup> See the United Nations Educational, Scientific and Cultural Organization, *Legal and Practical Measures Against Illicit Trafficking in Cultural Property: UNESCO Handbook* (Paris, International Standards Section Division of Cultural Heritage, 2006), p. 14.

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which recommended that States promote inter-agency cooperation for the purpose of strengthening mechanisms for protection against trafficking in cultural property<sup>263</sup>;

b. by the *Convention against Corruption*<sup>264</sup> (article 29), which provides for each State Party to “encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences”.

191. [CONTENT:] States should consider creating (or strengthening, where they already exist) adequate and swift channels of communication of reports and relevant information amongst the different specialized investigative units, and between such specialized investigative units and other law enforcement agencies. In addition, States should consider creating liaison officers or agents within different agencies, who will ensure access of all law enforcement agencies to the databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property. Finally, States should provide for direct communication channels and steady information exchanges between law enforcement agencies and the Central National Authority for cultural property protection (where created).

**GUIDELINE 36. States may consider allowing the use of special investigative techniques in the investigation of offences against cultural property, especially if related to organized crime.**

192. [RATIONALE:] States may consider allowing the use of the same special investigative techniques, which have already been successfully experimented in investigating complex types of crime, in order to investigate the most serious crimes against cultural property, especially those related to organized crime.

193. The use of special investigative techniques in investigating trafficking and related offences against cultural property should be taken into account by States because of the complexity of such offences, which are often transnational and involving a plurality of agents (or organized criminal groups). It is also beneficial because in the complexity and exclusivity of the art and antiquities market, licit and illicit dealings are often intermingled and because there is a high number of unreported offences, especially involving unregistered cultural properties. In addition, it is a workable technique that contributes to the efficacy of investigations, increases the probability of discovering, tracing and recovering illicitly trafficked cultural property, as well as of arresting and prosecuting offenders.

[BACKGROUND:] Special investigative techniques are already provided for in some national legislation, as well as in international conventions aimed at combating serious crimes (including trafficking in cultural property), such as:

a. the *Convention against Transnational Organized Crime*<sup>265</sup> (articles 20, 24 and 26), which provides for such techniques being used in investigating and prosecuting offences related to organized criminal groups' illicit activities;

b. the *Convention against Corruption*<sup>266</sup> (articles 32, 33 and 50), which provides for such techniques being used in investigating and prosecuting offences related to various forms of bribery and related offences.

<sup>263</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>264</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>265</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

194. [CONTENT:] States may consider allowing law enforcement agencies to use special investigative techniques, such as electronic or other forms of remote surveillance, and undercover operations, provided that the rights of the suspect are respected. States may also consider using controlled deliveries (i.e. allowing illicit or suspect consignments of cultural property to pass out of, through or into the territory of one or more States, under the covert supervision of law enforcement agencies and in order to identify offenders and collect intelligence), provided that the cultural properties involved are not exposed to irreparable damage, and respecting the suspects' rights. States might also use protected witnesses and whistleblowers, as well as informants to supply information that may be useful to investigations and prosecutions.

**GUIDELINE 37. States should consider putting in place national databases on trafficking in cultural objects and related offences.**

→ *See Guideline 2 on databases*

195. [RATIONALE:] States should taking necessary measures to put in place databases concerning criminal and administrative offences against cultural property, and including detailed information on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural objects, as well as people arrested and convicted for having been involved in illegal activities involving cultural property.

196. The specific contribution of such databases to effective investigation of offences against cultural property can be quite important. The inclusion in such a database of the fact that a cultural object has been trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, missing or otherwise illicitly dealt in, can help police and custom authorities to quickly identify the object (for example while it is being sent across borders with false documents, or being presented in on-line auctions, or appearing in a collection). It can make exchange of information amongst law enforcement agencies easier and swifter, and thereby foster better coordination of activities. Moreover, it can be a useful tool for information exchange and cooperation between national and international law enforcement agencies such as INTERPOL.

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<sup>266</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

## Chapter III. Cooperation

### Section I. Jurisdiction

**GUIDELINE 38.** *States should consider establishing their jurisdiction over the aforementioned criminal offences when the offence is committed within their territory, or by or against one of their nationals.*

197. [RATIONALE:] States should consider establishing their jurisdiction over the aforementioned criminal offences against cultural property when the offence is committed within their territory, or it is committed by or against one of their nationals, irrespective of where the cultural object is currently located.

[BACKGROUND:] Provisions about national criminal jurisdiction can be found in several relevant international conventions, such as:

a. the *UN Convention against Transnational Organized Crime*<sup>267</sup> (article 15) binds States Parties to establish their jurisdiction over offences related to organized crime, when the offence is committed in their territory or when the offence is committed on board of a vessel that is flying their flag, or of an aircraft that is registered under their laws;

b. the same *UN Convention against Transnational Organized Crime*<sup>268</sup> (article 15) also states that each State Party may also establish its jurisdiction over such offences when the offence is committed against its national, or by one of its nationals, or by a stateless person who has his or her habitual residence in the territory of the State itself, and also when the participation in an organized criminal group is committed outside the territory, but with a view to the commission of an offence within its territory;

c. the *Convention against Corruption*<sup>269</sup> (article 42) binds States Parties to establish their jurisdiction over offences related to various kinds of bribery, when the offence is committed in their territory or when the offence is committed on board of a vessel that is flying their flag, or of an aircraft that is registered under their laws;

d. the same *Convention against Corruption*<sup>270</sup> (article 42) also states that each State Party may also establish its jurisdiction over such offences when the offence is committed against its national, or by one of its nationals, or by a stateless person who has his or her habitual residence in the territory of the State itself, and also when the participation, association or conspiracy to commit or facilitate the laundering of proceeds of crime is committed outside the territory, but with a view to the commission of an offence within its territory;

e. the *Convention for the Protection of Cultural Property in the Event of Armed Conflict*<sup>271</sup> (article 28) requires State Parties to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention, while its *Second Protocol*<sup>272</sup> (article 16) binds States Parties to establish their jurisdiction over offences committed in their territory, as well as when the alleged offender is a national of theirs;

f. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>273</sup> (article 13) provides for States Parties to establish their competence to prosecute any offence

<sup>267</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>268</sup> *Ibid.*, vol. 2225, No. 39574.

<sup>269</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>270</sup> *Ibid.*, vol. 2349, No. 42146.

<sup>271</sup> United Nations, *Treaty Series*, vol. 249, No. 3511.

<sup>272</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>273</sup> Council of Europe, *European Treaty Series*, No. 119.

relating to cultural property which is committed on its territory, or on board a ship or an aircraft registered in it, or which is committed by one of its nationals or by a person having his/her habitual residence on its territory (provided that the suspected person is on its territory), or which is committed outside its territory when the cultural property against which that offence was directed belongs to one of its nationals.

198. [CONTENT:] Each State should consider establishing its jurisdiction when the criminal offence against cultural property is committed within the territory of the State itself (i.e., when all or part of the conduct, or the event which is caused by the conduct, or the conduct of one of the persons concurring in the offence, is committed or happens in its territory, including its internal and territorial waters and its airspace).

199. In case of an offence of conspiracy [see Guideline 21], each State should consider establishing its jurisdiction also when the offence is committed outside its territory, but with a view to the commission of an offence against cultural property within its territory. States should also consider establishing their jurisdiction when the offence is committed on board a vessel that is flying its flag, or of an aircraft that is registered under its laws. States should also consider establishing their jurisdiction when the offence is committed against its national, as well as when the offence is committed by one of its nationals, or by a stateless person who has his or her habitual residence in its territory. In any case, States should exercise their jurisdiction irrespective of where the cultural object is currently located.

200. States may choose to limit their jurisdiction only to some of the aforementioned cases, according to their national laws. In doing so, States should take into consideration the transnational nature of the art and antiquities market, the frequent circulation of movable cultural property as well as the fact that they can easily and quickly disappear from the radar of authorities. States should therefore aim at criminalisation measures that offer adequate possibilities for prosecuting offences against cultural property.

**GUIDELINE 39. States should consider establishing their jurisdiction over the aforementioned criminal offences, if committed abroad, when they impinge on a cultural property that belongs to their cultural heritage or is subject to enhanced protection.**

201. [RATIONALE:] States should consider establishing their jurisdiction over any offence committed abroad which impinges on a cultural property that belongs to their national cultural heritage, or which is subject to enhanced protection, in order to grant the widest possible protection and establish each State's criminal jurisdiction on offences against its cultural property. This could reduce the possibility of forum shopping by offenders and potential offenders, and reaffirm the value of national cultural heritage and the commitment of each State to preserve and protect it.

[BACKGROUND:] Similar provisions about national criminal jurisdiction can be found:

a. at regional level, in the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>274</sup> (article 13), which provides for States Parties to establish their competence to prosecute any offence relating to cultural property which is committed outside its territory, when the cultural property against which that offence was directed belongs to the same State Party (or one of its nationals), or even when the offence was directed against cultural property originally found within its territory (provided that the alleged offender is on its territory);

b. in the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>275</sup> (article 16), which binds States Parties to establish their jurisdiction over

<sup>274</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>275</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

offences against cultural property committed in the event of armed conflict even on the sole basis of the presence of the alleged offender in their territory, provided that the offence consisted either in making a cultural property under enhanced protection the object of attack, or in using cultural property under enhanced protection or its immediate surroundings in support of military action, or in an extensive destruction or appropriation of cultural property protected under the *Convention* and the *Protocol*.

202. [CONTENT:] Each State should consider establishing its jurisdiction over any offence which impinges on a cultural property belonging to its cultural heritage, regardless of the nationality of the offender or victim, as well as of the territory in which the offence was committed or the territory where the cultural property is found. In particular, each State should consider a cultural property as belonging to its cultural heritage, when<sup>276</sup> (i) the cultural property was created by the individual or collective genius of nationals of the State concerned; (ii) the cultural property is of importance to the State concerned and was created within its territory by foreigners or stateless persons residing within its territory; (iii) the cultural property was firstly found within its national territory; (iv) the cultural property has been the object of a freely agreed exchange amongst States; (v) the cultural property was received by the State or one of its nationals as a gift, or was purchased legally with the consent of the competent authorities of its country of origin; (vi) the cultural property was acquired by archaeological, ethnological or natural science missions, with the valid consent of the competent authorities of its country of origin.

203. States may consider establishing an extended jurisdiction over offences against cultural property (i.e. wherever committed and regardless of the nationality of the offender or the victim, or the origin of the cultural property itself), when the alleged offender is found in their territory, provided that the offence is related to cultural property under enhanced protection or that it is part of the heritage of mankind.

204. States may consider limiting the adoption of such extended jurisdiction to the most serious offences against cultural property.

**GUIDELINE 40. States should consider adopting all necessary measures to ensure the respect of *ne bis in idem* principle.**

205. [RATIONALE:] States should consider adopting all necessary measures in order to ensure the respect of *ne bis in idem* principle with regard to criminal proceedings for offences against cultural property (as well as, more generally, for any criminal offence), in order to ensure that the same offender is not sanctioned (or prosecuted) twice (or more) for the same offence, and in order to avoid duplication of proceedings and related costs amongst different jurisdictions, as well as potential controversies amongst States.

[BACKGROUND:] The respect of *ne bis in idem* principle, or similar rules, are expressly provided for:

a. in relation specifically to offences against cultural property, by the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>277</sup> (from article 14 to article 19);

<sup>276</sup> This definition of “cultural heritage” is borrowed almost literally by article 4 of the *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (see United Nations, *Treaty Series*, vol. 823, No. 11806). Other definitions can be adopted, such as, for example, the one provided for in article 2 of *Council of Europe Framework Convention on the Value of Cultural Heritage for Society*, Faro, 27 October 2005 (“Cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time”). But the latter isn’t sufficiently analytic and precise for the purposes of criminal law and criminal procedure.

<sup>277</sup> Council of Europe, *European Treaty Series*, No. 119.

b. in general, by article 14 of the *International Covenant on Civil and Political Rights*<sup>278</sup>, that expressly states that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”;

c. by the *UN Convention against Transnational Organized Crime*<sup>279</sup> (article 15), which provides that if a State Party exercising its jurisdiction on an offence related to organized crime “has been notified, or has otherwise learned, that one or more other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions”;

d. by the *Convention against Corruption*<sup>280</sup> (article 42), which provides that if a State Party exercising its jurisdiction on a case of bribery or related offences “has been notified, or has otherwise learned, that one or more other State Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of Those States Parties shall, as appropriate, consult one another with a view to coordinating their actions”.

206. [CONTENT:] States should consider adopting all necessary measures in order to ensure that a person in respect of whom a final and enforceable criminal judgment has been rendered may for the same act neither be prosecuted, nor sentenced, nor subjected to enforcement of a sanction in another State, if he or she was acquitted. In same vein, such person should be free from further prosecution if he or she had been convicted in another State, whether sentenced or not, or where the sentence had been wholly or partially enforced, was the subject of a pardon or an amnesty, or the unenforced sentence had expired by operation of law.

207. The application of either all or part of this guideline is not intended to prevent the application of wider domestic provisions relating to the *ne bis in idem* rule, when it is so required by the fundamental principles of a State.

208. Each State may also consider adopting all necessary measures, whenever it becomes aware of proceedings pending in another State against the same person and in respect of the same offence, in order to:

a. consider waiving or suspending its own proceedings;

b. consult with the other State, in order to determine, (with a view to facilitating the restitution of the cultural property), which of the states is better placed to conduct the proceedings;

c. where it chooses not to waive or suspend its own proceedings, to so notify the other State in good time, and in any event before judgment.

## Section II. Judicial cooperation in criminal matters

**GUIDELINE 41. States should consider signing, ratifying and implementing existing international law instruments (in particular the UN Convention against Transnational Organized Crime) for granting judicial cooperation in criminal cases related to the protection of cultural property.**

209. [RATIONALE:] The adoption and implementation of instruments for granting international judicial cooperation in criminal cases related to the protection of cultural

<sup>278</sup> General Assembly resolution 2200 A (XXI), annex.

<sup>279</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>280</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

property through the application of existing conventional provisions have several advantages. Firstly, it can enhance the efficacy of investigations, prosecutions and proceedings of offences against cultural property, thereby indirectly improving prevention of trafficking in cultural property and related offences. Secondly, the application of existing international conventions may be easier and swifter than other strategies. This is particularly relevant to the *UN Convention against Transnational Organized Crime* which encourages States Parties to use the Convention as the legal basis for judicial cooperation where no other arrangements already exist. This means that States can rely on the convention to request and offer judicial cooperation for the most serious offences against cultural property, where the crime is transnational and involves an organized criminal group.

[BACKGROUND:] The use of existing international conventions for the purpose of enhancing judicial cooperation in combating offences against cultural property has been taken into account and positively evaluated:

a. by the UNODC Expert group *on protection against trafficking in cultural property*, which expressly stated that “for the purpose of providing each other with the widest possible mutual legal assistance in protection against trafficking in cultural property, including with regard to investigation, prosecution and confiscation, States should endeavour to use the relevant existing instruments”, including the *UN Convention against Transnational Organized Crime*<sup>281</sup>;

b. by the same UNODC Expert group *on protection against trafficking in cultural property*, that also encouraged States to enter into bilateral or multilateral agreements for judicial cooperation in order to enhance protection against trafficking in cultural property<sup>282</sup>;

c. by the *Salvador Declaration*, which particularly urged States to “strengthen international cooperation and technical assistance” in combating offences against cultural property, “bearing in mind the existing international instruments, including the *United Nations Convention Against Organized crime* where appropriate”<sup>283</sup>;

d. by the Conference of the Parties to the *UN Convention against Transnational Organized Crime* in its *Resolution 5/7* of 2010<sup>284</sup>, which encouraged States to make fully use of the same *Convention* in order to enhance the effectiveness of international cooperation in combating criminal offences against cultural property;

e. by the Commission on Crime Prevention and Criminal Justice in its *Draft resolution* of 2010, on *Crime prevention and criminal justice responses to protect cultural property*<sup>285</sup>, as well as in its *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>286</sup>, where it urged Member States to continue to strengthen cooperation and mutual legal assistance for the prevention, prosecution and punishment of crimes against cultural property and, invited them to consider ratifying and implementing the relevant international instruments, including, as appropriate, the *UN Convention against Transnational Organized Crime*.

210. [CONTENT:] States may avail themselves of the relevant provisions included in:

a. the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>287</sup>, with regard to crimes against cultural property committed in the event of armed conflict;

b. the *Geneva Protocol I* [1977], also with regard to crimes against cultural property committed in the event of armed conflict<sup>288</sup>;

<sup>281</sup> See UNODC/CCPCJ/EG1/2009/2

<sup>282</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>283</sup> See A/CONF.213/18, chap. I, resolution 1.

<sup>284</sup> See CTOC/COP/2010/17.

<sup>285</sup> See E/2010/30 E/CN.15/2010/20.

<sup>286</sup> See E/2011/30 E/CN.15/2011/21.

<sup>287</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

c. at regional level, the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>289</sup> (articles 5 and the following), which provides for States Parties to take all “appropriate measures with a view to co-operating in the prevention of offences relating to cultural property and the discovery of cultural property removed subsequent to such offences”;

d. the *UN Convention against Transnational Organized Crime*<sup>290</sup> (article 18), in relation to each offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention (or a more serious penalty);

e. the *Convention against Corruption*<sup>291</sup> (articles 43 and 46), in relation to laundering of proceeds of crimes against cultural property and corruption (which is often instrumental to trafficking in cultural property and related offences).

211. [OPTIONS:] States should consider becoming parties of the aforementioned Conventions, if they are not. If they are already parties, but have not yet fully implemented the Conventions, they should consider adopting all relevant criminal law provisions to ensure implementation. States may also consider adopting *ad hoc* bilateral or multilateral agreements in order to implement conventional provisions and so strengthen judicial cooperation in combating trafficking in cultural property and related offences.

**GUIDELINE 42. States should consider providing each other with the widest possible mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences against cultural property, and in order to enhance the effectiveness and speed of the procedures.**

212. [RATIONALE:] The strengthening of mutual legal assistance in criminal matters between and among States for investigations, prosecutions and other proceedings relating to offences against cultural property, is an important aspect of States’ efforts to protect cultural property and prevent trafficking in cultural property and related offences.

[BACKGROUND:] Provisions and recommendations on strengthening mutual legal assistance amongst States in respect of offences related to cultural property, can be found in several relevant international conventions or documents, and can usefully serve as models for further measures to be adopted by States. For example:

a. the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>292</sup> (article 19), with regard to crimes against cultural property committed in the event of armed conflict;

b. the *Additional Protocols of 1977 to the Geneva Conventions of 1949*<sup>293</sup> (article 88), also with regard to crimes against cultural property committed in the event of armed conflict;

c. at regional level, the *European Convention on Offences relating to Cultural Property*<sup>294</sup>;

d. the *UN Convention against Transnational Organized Crime*<sup>295</sup> (article 18), in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and

<sup>288</sup> See article 88, United Nations, *Treaty Series*, vol. 1125, No. 17512.

<sup>289</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>290</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>291</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>292</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>293</sup> United Nations, *Treaty Series*, vol. 1125, No. 17512.

<sup>294</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>295</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

whose gravity requires the provision of a penalty of at least four years of detention (or a more serious penalty);

e. the *Convention against Corruption*<sup>296</sup> (article 43 and article 46), in relation to laundering of proceeds of crimes against cultural property and corruption (which is often instrumental to trafficking in cultural property and related offences);

f. the *Report of the UNODC Expert group on protection against trafficking in cultural property*, which encouraged States to provide each other with the widest possible mutual legal assistance (including through bilateral or multilateral agreements for judicial cooperation) in protection against trafficking in cultural property, including with regard to investigation, prosecution and confiscation<sup>297</sup>;

g. the *Salvador Declaration*, which particularly urged States to “strengthen international cooperation and technical assistance” in combating offences against cultural property<sup>298</sup>;

h. the *Resolution 5/7* of 2010 of the Conference of the Parties to the *UN Convention against Transnational Organized Crime*<sup>299</sup>, which encouraged States to make full use of the same *Convention* in order to enhance the effectiveness of international cooperation in combating criminal offences against cultural property;

i. the *Draft resolution* of 2010, on *Crime prevention and criminal justice responses to protect cultural property*<sup>300</sup>, and the *Draft resolution* of 2011, on *Strengthening crime prevention and criminal justice responses to protect cultural property*<sup>301</sup>, by the Commission on Crime Prevention and Criminal Justice, urged Member States to continue to strengthen cooperation and mutual legal assistance for the prevention, prosecution and punishment of crimes against cultural property.

213. [CONTENT:] States should consider taking all necessary measures in order to assist each other to the fullest extent possible with respect to investigations, prosecutions and judicial proceedings for any criminal offence against cultural property. In particular, States should consider cooperating in: collecting evidence or statements from persons, effecting service of judicial documents, executing search and seizure or freezing orders, examining objects and sites, and providing information, evidentiary items and expert evaluations. Moreover, States should consider cooperating in: (i) providing original or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; (ii) identifying or tracing illegal cultural properties, as well as any related proceeds of crime, instrumentalities or other things, for evidentiary purposes; (iii) facilitating the voluntary appearance of witnesses in the requesting State; (v) identifying, tracing and seizing illegal cultural properties, as well as any related proceeds of crime for recovery purpose; (vi) granting the recovery and, when needed, restitution of the cultural properties, as well as of any related proceeds of crime, and (vii) any other type of direct assistance that is not contrary to the domestic law of the requested State.

214. Request for cooperation should be transmitted by the competent authority of the issuing State directly to the authority of the executing State which is competent to execute it, by any means capable of producing a written record, such as e-mail or fax, but allowing the executing State to establish authenticity through the same or similar manner. The original of the request shall be transmitted to the executing State if it so requires. All official communications should be made directly between the said competent authorities.

<sup>296</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>297</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>298</sup> See A/CONF.213/18, chap. I, resolution 1.

<sup>299</sup> See CTOC/COP/2010/17.

<sup>300</sup> See E/2010/30 E/CN.15/2010/20.

<sup>301</sup> See E/2011/30 E/CN.15/2011/21.

215. Each State should designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. States should consider providing for direct channels of cooperation whenever feasible, without need of using the diplomatic channels.

216. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party, where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings, or could result in a request formulated by the requesting State Party in relation to proceedings for trafficking in cultural property or other related offences.

217. States should not decline to render mutual legal assistance on the ground of bank secrecy or that the alleged offence is considered to involve fiscal matters. States may grant mutual legal assistance, where possible, without the condition of dual criminality, and where it is impossible to do so, consider providing assistance to the extent possible. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

218. Before refusing a request or postponing its execution, the requested State should consult with the requesting State, to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. In any event States should give reasons for refusing mutual legal assistance requests.

219. The requested State should execute the request for mutual legal assistance as soon as possible, and should comply as best as possible with any deadlines suggested by the requesting State and for which reasons are given, preferably in the request itself.

220. States should consider adopting *ad hoc* bilateral or multilateral agreements in order to strengthen mutual legal assistance in combating trafficking in cultural property and related offences.

**GUIDELINE 43. States should contribute to and update regularly the UNESCO database on national cultural heritage laws and any other relevant database.**

221. [RATIONALE:] States should contribute to and update regularly the UNESCO database on national cultural heritage law, in order to facilitate international investigative and judicial cooperation, by making immediately available all relevant national legislations to investigators, prosecutors, judges and members of competent authorities. States may consider contributing to other specific databases relevant for preventing and combating the offence of trafficking in cultural property and the other related offences.

[BACKGROUND:] Databases on national laws and regulations relevant for the protection of cultural heritage are considered in some international texts or documents:

a. the UNESCO *Database of National Cultural Heritage Laws* encompasses: national laws currently in force related to the protection of the cultural heritage in general; import/export certificates for cultural property (available on request); official or unofficial translations of national laws and certificates; contact details for the national authorities responsible for the protection of the cultural heritage; addresses of the official national websites dedicated to the protection of the cultural heritage.

b. the creation and implementation of a shared international database of national laws related to cultural property protection has been taken into account by the *Model Treaty for the prevention of crimes*

*that infringe on the cultural heritage of peoples in the form of movable property*<sup>302</sup> (article 4), which expressly encourages each State to “provide information concerning laws which protect its movable cultural property to an international database agreed upon between the States”;

c. the UNESCO *Draft database on the return of cultural property* currently being discussed is intended to provide creative solutions and alternative methods to resolve restitution claims.

222. [CONTENT:] States should contribute to and update regularly the UNESCO database on national cultural heritage law, by providing all the national laws and regulations related to the prevention and combating of trafficking in cultural property and related offences. National rules currently applicable should be included as well as a history of past legislation and regulations.

223. States should make use of the existing Legal Library of the United Nations Office on Drugs and Crime<sup>303</sup>, and submit legislation on cultural property protection not yet contained in it, as well as periodically review the laws already registered to ensure that the entries are updated. In particular, States should consider the setting up of a more specific international database of domestic criminal legislation on cultural property protection, following the model of the existing UNODC’s Counter-terrorism Legislation Database<sup>304</sup>, or Anti-Money Laundering International Database<sup>305</sup>. Such a database should contain excerpts of the different laws, as well as practical guidelines addressed to law enforcement agencies, and should be provided by States to UNODC.

224. States should also consider keeping up-to-date such legislative database by regularly providing new and amended legislation on cultural property protection. They should also consider including in such database, relevant case law. States may also consider including in the database national laws and regulation referring to judicial cooperation in criminal matters, as well as cases and best practices. Such database may be linked to the UNESCO *Draft database on the return of cultural property*.

### Section III. Extradition

**GUIDELINE 44.** *States should consider making crimes against cultural property extraditable offences, and link, whenever possible, the extradition of the alleged offender with the recovery and restitution of the cultural property involved.*

225. [RATIONALE:] The inclusion of offences against cultural property amongst extraditable offences is necessary in order to ensure the efficacy of criminal law provisions even when the alleged offender is in the territory of another State. It is also necessary to reduce the opportunity for offenders or potential offenders to seek refuge abroad, or to commit offences against cultural property in countries of which they are not nationals or habitual residents.

[BACKGROUND:] Extradition for offences against cultural property, is already provided for:

<sup>302</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>303</sup> See [www.unodc.org/enl/index.html](http://www.unodc.org/enl/index.html)

<sup>304</sup> See [www.unodc.org/tldb/en/index.html](http://www.unodc.org/tldb/en/index.html)

<sup>305</sup> See [www.imolin.org/amlid/index.html](http://www.imolin.org/amlid/index.html)

a. in the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>306</sup> (article 18), which requires that crimes against cultural property committed in the event of armed conflict, be included amongst extraditable offences in any extradition treaty existing or to be subsequently concluded between any of the Parties of the same *Protocol*;

b. the same *Second Protocol* (article 18) provides for the protocol to be adopted by a State Party as an autonomous legal basis for any request for extradition towards another State Party with which it has no extradition treaty;

c. in the *Additional Protocols of 1977 to the Geneva Conventions of 1949*<sup>307</sup> (article 88), also with regard to crimes against cultural property committed in the event of armed conflict, which states that “when circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition”;

d. at regional level, the *European Convention on Offences relating to Cultural Property*<sup>308</sup> (article 8) calls upon each State party to provide that, where there is a request for extradition, the return of the cultural property “shall take place even if extradition, having been agreed to, cannot be carried out owing to the death or escape of the person claimed or to other reasons of fact”;

e. in the *UN Convention against Transnational Organized Crime* (article 16)<sup>309</sup> allows for the *Convention* itself to be considered the legal basis for extradition, in the absence of a specific extradition treaty between the States, and provided that the offence for which extradition is sought is punishable under the domestic law of both States. This is applicable to any offence against cultural property which is transnational in nature, involves an organized criminal group and which is punishable by a penalty of at least four years of detention,;

f. in the *Convention against Corruption*<sup>310</sup> (article 44), provides that laundering of the proceeds of crime and corruption (which is often instrumental to trafficking in cultural property and related offences), shall be included amongst extraditable offences in any extradition treaty existing or to be subsequently concluded between any of the Parties of the same *Convention*;

g. in the same *Convention against Corruption*<sup>311</sup> (article 44), provides that in the absence of an extradition treaty, the *Convention* itself may be considered as the legal basis for extradition.

226. [CONTENT:] States should consider taking all necessary measures to include crimes against cultural property amongst extraditable offences, as well as to link the extradition of an offender with the recovery and restitution of the cultural property which is the subject matter of the offence committed, whenever possible. In particular States should consider including such offences amongst extraditable offences in any extradition treaty existing or to be subsequently concluded by them. States should also consider becoming parties to, and implementing, any applicable international convention (such as the aforementioned ones). Whenever necessary, States should consider integrating existing international conventions with bilateral or multilateral agreements on extradition for offences against cultural property. Even without or before joining existing international conventions, States should consider concluding bilateral or multilateral agreements on extradition for offences against cultural property.

227. States may require, according to their national legislation that the offence for which extradition is required is also punished in their domestic law (dual criminality requirement). States may introduce, according to their national legislation, conditions in relation to a minimum penalty requirement for extradition. States may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

<sup>306</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>307</sup> United Nations, *Treaty Series*, vol. 1125, No. 17512.

<sup>308</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>309</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>310</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>311</sup> *Ibid.*, vol. 2349, No. 42146.

States should consider providing, in such bilateral or multilateral agreements, for the concomitant restitution (whenever possible) of the movable cultural property upon which is the subject matter of the offence, even in case of impossibility or refusal to extradite.

**GUIDELINE 45. States should consider enhancing the effectiveness and speed of extradition for offences against cultural property, and provide for the principle of 'extradite or prosecute'.**

228. [RATIONALE:] States should consider taking necessary measures in order to enhance the effectiveness and speed of extradition for offences against cultural property, as well as to ensure that the offender is either extradited or prosecuted. A potential result of these measures could be a reduction of the opportunity for offenders or potential offenders to seek refuge abroad or to commit offences against cultural property in other countries.

[BACKGROUND:] Similar provisions have been already adopted:

a. by the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*<sup>312</sup> (article 18), with regard to crimes against cultural property committed in the event of armed conflict;

b. by the *UN Convention against Transnational Organized Crime*<sup>313</sup> (article 16), in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention;

c. by the *Convention against Corruption*<sup>314</sup> (article 44), in relation to laundering of proceeds of crimes and corruption (which is often instrumental to trafficking in cultural property and related offences).

229. [CONTENT:] States should consider taking all necessary measures to ensure the effective and swift execution of extradition for offences against cultural property, as well as the respect of the *aut dedere, aut iudicare* principle (i.e., to either extradite or prosecute the alleged offender).

230. In particular States should consider acceding to, and implementing any applicable international convention (such as the aforementioned ones). Whenever necessary, States should consider concluding bilateral and multilateral agreements or arrangements to enable effective extradition. States should, according to their domestic law, endeavour to expedite extradition procedures and to simplify related evidentiary requirements and take all reasonable measures to effect extradition requests relating to offences against cultural property. Where a State's law does not allow for nationals to be extradited, it should ensure that the person sought is prosecuted at home for the offences for which extradition was sought. If the request relates to service of sentence imposed by the requesting State, the requested State which cannot extradite should have measures in place to ensure that the sentence is served in its territory in conformity with its domestic laws.

<sup>312</sup> United Nations, *Treaty Series*, vol. 2253, No. 3511.

<sup>313</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>314</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

## Section IV. International seizure and confiscation

**GUIDELINE 46.** *States should consider cooperating in identifying, tracing, seizing and confiscating trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property.*

231. [RATIONALE:] International cooperation in identifying and tracing trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property, as well as in executing searches, seizures, freezing or confiscations, can be particularly relevant in order to enable return, restitution and repatriation to its legitimate owner, and in order to reintegrate the national cultural heritage harmed by the offence.

[BACKGROUND:] Provisions or recommendations for strengthening cooperation amongst States in international seizure and confiscation, with regard to offences related to cultural property, can be found in some relevant international conventions or documents. For example:

- a. in the *UN Convention against Transnational Organized Crime*<sup>315</sup> (article 13), in relation to any offence (against cultural property) which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention;
- b. in the *Convention against Corruption*<sup>316</sup> (articles 51, 54, 55 and 57), in relation to laundering of proceeds of crimes (against cultural property) and corruption (which is often instrumental to trafficking in cultural property and related offences) and related offences;
- c. in the report of the UNODC Expert group *on protection against trafficking in cultural property*, which encouraged States to provide each other with the widest possible mutual legal assistance (including through bilateral or multilateral agreements for judicial cooperation) to protect against trafficking in cultural property, including with regard to confiscation<sup>317</sup>;
- d. in the *Resolution 5/7* of 2010 of the Conference of the Parties to the *UN Convention against Transnational Organized Crime*<sup>318</sup>, which encouraged States to make full use of the same *Convention* in order to enhance the effectiveness of international cooperation in combating criminal offences against cultural property;

232. [CONTENT:] Each State should adopt all necessary measures to ensure the expeditious execution of requests, by other States, to identify and/or trace, seize and confiscate trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural properties. Such measures should also cover proceeds derived from such illicit activities. Finally, States should consider improving cooperation for purposes of confiscation and restitution of cultural property, where needed, through bilateral or multilateral specific agreements or arrangements.

**GUIDELINE 47.** *States may consider putting in place mechanisms to enable contribution of confiscated financial assets to international or intergovernmental bodies concerned with the fight against transnational organised crime including trafficking in cultural property and related offences.*

233. [RATIONALE:] The contribution of some part of confiscated economic assets (different from cultural property) related to offences against cultural property to

<sup>315</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>316</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>317</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>318</sup> See CTOC/COP/2010/17.

international or intergovernmental bodies specialized in the fight against trafficking will provide (at least part of) the needed funds for steady international cooperation and for the most costly preventive measures, such as international digital inventories and databases, specialized training, sensitization programs and campaigns, etc. This can also indirectly contribute to improved protection of cultural heritage.

[BACKGROUND:] Some international conventions provide for destining a part of proceeds of crime to financing prevention policies and specialized intergovernmental bodies. For example:

a. the *UN Convention against Transnational Organized Crime*<sup>319</sup> (articles 14 and 30) encourages States Parties to conclude agreements or arrangements on contributing the value of proceeds of crime or property realised from international confiscation, or funds derived from the sale of such proceeds of crime or property, or a part thereof, to the account designated for providing technical assistance to developing countries and countries with economies in transition to fight organized crime, within the United Nations Crime Prevention and Criminal Justice Fund, and to intergovernmental bodies specializing in the fight against organized crime;

b. the *Convention against Corruption*<sup>320</sup> (article 62) provides for a similar account, and encourages State Parties to contribute “a percentage of the money or of the corresponding value of proceeds of crime or property confiscated”.

234. [CONTENT:] States may consider concluding agreements or arrangements in order to assign confiscated assets to international or intergovernmental bodies specialized in the fight against organised crime including trafficking in cultural property and related offences. In this regard, such assets could be contributed towards the Fund established under Article 30 of the Convention against Transnational Organised Crime.

## Section V. Police and investigative cooperation

**GUIDELINE 48.** *States should consider enhancing exchange of information on offences against cultural property by sharing or interconnecting inventories of cultural property and databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property, and/or contributing to international ones.*

→ See also Guidelines 1 and 2.

→ See also Guideline 37.

235. [RATIONALE:] Enforcement authorities should enhance exchange of information on offences against cultural property by sharing or interconnecting inventories of cultural property and databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property, and/or contributing to international ones. The advantages of such connectivity are numerous: (i) art and antiquities dealers, as well as museums and other professionals, can consult the databases before dealing in any cultural object; police and custom authorities can use them to identify illegal cultural objects (for example while being sent across borders with false documents, or being presented in

<sup>319</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>320</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

on-line auctions, or appearing in a collection)<sup>321</sup>; prosecutors and judges can rely on them for collecting evidence on the illicit origin of cultural property.

[BACKGROUND:] There are some examples of such exchanges of information at international level:

a. INTERPOL provides the fundamental *Stolen Works of Art Database*, which is accessible to all INTERPOL member Countries<sup>322</sup>; until 2009 INTERPOL also periodically issued a widely available *Stolen Works of Art CD-ROM*, as well as posters showing the most sought after stolen works of art. The modernization of INTERPOL's *Stolen Works of Art Database* is currently underway. Under the codename PSYCHE (*Protection System for Cultural Heritage*), the Italian Carabinieri Specialized Unit for the protection of cultural heritage leads a project in close co-operation with INTERPOL aimed at modernising the INTERPOL database. Its objectives are:

- to enable direct data integration by member countries using a formatted message system;
- to enact direct transfer from Italy's database Leonardo into INTERPOL's database;
- to simplify queries with the use of an image similarity software tool;
- to provide training (e-learning module and training sessions) to member countries.

The implementation of the project is subject to funding requested to the European Commission on 17 October 2011;

b. In the past, ICOM provided the *One-Hundred Missing Objects Series*<sup>323</sup>, which listed objects that had been stolen and whose disappearance had been reported to the police. It also integrated the *Red List* that more generally classifies the endangered categories of archaeological objects or works of art in the most vulnerable areas of the world, in order to prevent them being sold or illegally exported;

c. according to Recommendation 33 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>324</sup>, EU Commission should promote an expert study in order to provide a thorough technical assessment of the existing databases at Member State level and an evaluation of the feasibility of a mechanism that would ensure that existing databases are inter-operable and can communicate. This activity should be conducted by information technology specialists, in cooperation with relevant representatives of national authorities.

236. States should consider sharing or interconnecting their national databases on trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property, and contributing to INTERPOL's *Stolen Works of Art Database*, which is the only public international existing database. The inclusion of such cultural property in the database can help police and custom authorities worldwide to quickly identify illegally obtained cultural property at border posts, at on-line auctions, or in collections. It can also facilitate exchange of information and international cooperation among law enforcement agencies of different countries and between them and international law enforcement organisations such as INTERPOL.

237. States should also consider sharing or interconnecting their national inventories of cultural property, and/or contributing to existing international inventories, or even concluding agreements in order to create a unified international inventory. This can facilitate the identification of cultural objects, both by national authorities and by *bona fide* dealers or purchasers worldwide. Moreover, it can support police and other control agencies in monitoring the international art market, especially in tracing trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural objects

<sup>321</sup> See also article 5, subparagraph (g), of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (United Nations, *Treaty Series*, vol. 823, No. 11806).

<sup>322</sup> See [www.interpol.int/Public/WorkOfArt/Default.asp](http://www.interpol.int/Public/WorkOfArt/Default.asp).

<sup>323</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic.html>.

<sup>324</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

(particularly when a cross-check with the aforementioned databases is provided). In addition, it can provide a sound basis for claims for return, restitution and repatriation.

**GUIDELINE 49. States should consider enhancing exchange of information on previous convictions and ongoing investigations of offences against cultural property.**

238. [RATIONALE:] The exchange of information amongst national law enforcement agencies in relation to previous convictions and ongoing investigations for trafficking or related offences against cultural property can facilitate investigations on offences against cultural property. It can also provide evidence of consistent pattern of activity of an offender being tried in another State. Such exchange can also provide useful information to authorities when considering the grant of licenses or other authorization for archaeological excavations, dealings in art and antiques, auctions of cultural property, or other similar activities.

[BACKGROUND:] The exchange of information related to previous convictions for criminal offences is already provided for, amongst others:

a. in the *UN Convention against Transnational Organized Crime*<sup>325</sup> (article 22), which may be applied in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention, and which states that “each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence” covered by the convention;

b. in the *Convention against Corruption*<sup>326</sup> (article 41), in relation to laundering of proceeds of crimes (including cultural property related crimes) and corruption, which contains a similar provision.

239. [CONTENT:] States should consider using existing international instruments (such as the aforementioned ones) in order to facilitate the exchange of information in relation to previous convictions for offences against cultural property and ongoing investigations, whenever possible. States should also consider concluding bilateral or multilateral agreements in order to allow such exchanges on a regular basis, and where possible establish direct channels of communication amongst national law enforcement agencies for that purpose.

**GUIDELINE 50. States may consider concluding bilateral or multilateral agreements or arrangements in order to establish joint investigative teams for crimes against cultural property.**

240. [RATIONALE:] Due to the often transnational nature of art and antiques market, the creation of joint investigative teams by States investigating offences against cultural property can be particularly useful. Such teams can also contribute to the exchange of best practices and investigative techniques among law enforcement agencies of different states. Another advantage is the facilitation of information exchange amongst law enforcement agencies of different States and increased efficiency of prevention strategies.

[BACKGROUND:] Cooperation in investigations including the setting up of joint investigative bodies for transnational offences including those relating cultural property are already provided for:

<sup>325</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>326</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

a. in the *UN Convention against Transnational Organized Crime*<sup>327</sup> (article 19), in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention;

b. in the *Convention against Corruption*<sup>328</sup> (articles 48 and 49), in relation to laundering of proceeds of crimes (including offences against cultural property) and corruption (which is often instrumental to trafficking in cultural property and related offences) and related offences.

241. [CONTENT:] States may consider taking necessary measures, including entering into specific bilateral or multilateral agreements, in order to establish joint investigative teams to investigate transnational offences against cultural property. Also, States may consider facilitating effective coordination amongst national law enforcement agencies, through exchange of personnel and other experts, including, where feasible, the posting of liaisons officers. Finally, States may also facilitate direct communication channels between the teams and international organizations charged with cultural property protection, such as INTERPOL, UNESCO and UNIDROIT.

**GUIDELINE 51. States should consider assisting each other in planning and implementing specialised training programs for law enforcement personnel.**

→ See also Guideline 34.

242. [RATIONALE:] States should consider assisting each other in planning and implementing specialised training programs for law enforcement personnel because of the complexity of offences against cultural property, and the peculiar nature of the objects involved which requires a specialised knowledge of international art and antiquities market by the investigators. States should also consider assisting each other with specialised training programs on foreign and international laws and sharing of best practices, to facilitate cooperation among law enforcement agencies and improve the efficiency of investigations of offences against cultural property.

[BACKGROUND:] International cooperation in planning and implementing special training programs for law enforcement personnel in relation to offences against cultural property, is provided for or recommended:

a. by UNESCO and World Customs Organization, which, with a view to protecting cultural heritage, encourages effective co-operation and partnership with other international organization and law enforcement agencies such as ICOM, UNESCO and Interpol, aimed at exchanging information and stemming this illegal activity. To accomplish this mission the WCO relies on the competencies and daily efforts of member Customs administrations, as well as on its Regional Intelligence Liaison Offices – (RILO) Network.

b. by the INTERPOL expert group on stolen cultural property, which, in the Conclusions of the 2010 meeting, invited INTERPOL and its member Countries to provide training opportunities on the fight against illicit trafficking in cultural property for law enforcement, judicial and other competent authorities<sup>329</sup>;

c. by the “Charter of Courmayeur” which recommended the formulation of specific country projects by UN and UNESCO, in cooperation with relevant international agencies and organizations, in order to improve national training programs of law enforcement officials and customs personnel in the identification of cultural objects<sup>330</sup>;

<sup>327</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>328</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>329</sup> See the conclusions of the Seventh Meeting of the INTERPOL Expert Group (IEG) on Stolen Cultural Property, held in Lyon on 23 and 24 February 2010.

<sup>330</sup> See the Charter of Courmayeur.

d. by ICOM which organises worldwide workshops on the illicit trafficking of cultural goods for museum professionals, police and customs agents, in order to teach best practices<sup>331</sup>;

e. by the *UN Convention against Transnational Organized Crime*<sup>332</sup> (article 29), which provides for States Parties to assist one another in planning and implementing training programs designed to share expertise, including through regional and international conferences or seminars;

f. by the *Convention against Corruption*<sup>333</sup> (article 60), which makes similar provisions;

g. at the regional level, by Recommendation 31 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>334</sup>, which provides that EU Member States should greatly improve cooperation regarding the exchange of information, knowledge and experiences in the prevention of theft and the fight against illicit trafficking of cultural goods.

243. [CONTENT:] States should consider concluding bilateral or multilateral agreements or arrangements in order to provide for the organization and implementation of shared specialized training programs on a regular basis, and in order to maximize training activities in international and regional organizations. Specialized training programs should be provided for police, customs and border police as well as public prosecutors and judges. States should also consider concluding bilateral or multilateral agreements or arrangements in order to promote the regular organization of regional or international conferences or seminars for law enforcement personnel and experts, on offences against cultural property. Such programmes should also promote international exchanges of experts and law enforcement personnel, to share investigative techniques and best practices.

**GUIDELINE 52. States should consider enhancing or establishing privileged channels of communication between their law enforcement agencies.**

244. [RATIONALE:] The presence of swift and steady communication channels among law enforcement agencies of states charged with the investigation and prosecution of offences against cultural property can be very useful. This is because such offences are very often transnational in nature and the art and antiques market are generally not very open, thereby making investigations and prosecutions by any single state very challenging. The existence of such communication channels can therefore facilitate the work of investigators and prosecutors in preventing and combating trafficking in cultural property and related offences.

[BACKGROUND:] The sharing of information, through the adoption and implementation of privileged channels of communication among law enforcement agencies of different countries, has been positively evaluated:

a. by INTERPOL, which has a dedicated channel for communication among national police authorities<sup>335</sup>;

b. by the *Convention on the Protection of the Underwater Cultural Heritage*<sup>336</sup> (article 19), which provides for States Parties to “share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to

<sup>331</sup> See <http://icom.museum/what-we-do/programmes/fighting-illicit-traffic/illicit-traffic-workshops.html>

<sup>332</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>333</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>334</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

<sup>335</sup> See <http://www.interpol.int/INTERPOL-expertise/Data-exchange>

<sup>336</sup> United Nations Educational, Scientific and Cultural Organization, *Records of the General Conference, Thirty-first Session, Paris, 15 October-3 November 2001*, vol. 1 and corrigendum: *Resolutions*, resolution 24.

this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage”;

c. at regional level, by the *European Convention on the Protection of the Archaeological Heritage (Revised)*<sup>337</sup> (article 10), which binds States Parties to “arrange for the relevant public authorities and for scientific institutions to pool information on any illicit excavations identified”;

d. at regional level, by the Council of Europe *European Convention on Offences relating to Cultural Property*<sup>338</sup> (article 7), which provides for a set of notifications to interested States Parties in case of offences against cultural property which may involve other States Parties than the one from where the object was stolen or illicitly exported;

e. by the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>339</sup>, which, in article 4, lists the exchange of “such information as will assist in combating crimes against movable cultural property” amongst the procedures that States shall consider adopting and implement;

f. in relation to any offence against cultural property which is transnational in nature, involves an organized criminal group and whose gravity requires the provision of a penalty of at least four years of detention, by the *UN Convention against Transnational Organized Crime*<sup>340</sup> (articles 18, 27 and 28);

g. in relation to laundering of proceeds of crimes against cultural property and corruption (which is often instrumental to trafficking in cultural property and related offences) and related offences, by the *Convention against Corruption*<sup>341</sup> (articles 46 and 48);

h. by the Economic and Social Council Resolution 2008/23, which particularly stressed the importance of fostering international law enforcement cooperation to combat trafficking in cultural property and, in particular, the need to increase the exchange of information and experiences in order for competent authorities to operate in a more effective manner;

i. by the UNODC Expert group *on protection against trafficking in cultural property*, which expressly recommended that “States should consider including, in their cooperation agreements on protection against trafficking in cultural property, specific provisions for information exchange”<sup>342</sup>;

j. by the Conference of the Parties to the *UN Convention against Transnational Organized Crime*, which, in its Resolution 5/7 of 2010<sup>343</sup>, invited States to exchange information on all aspects of offences against cultural property;

l. at the regional level, according to Recommendation 31 of the OMC Expert Working Group on the Mobility of Collections' *Final report and recommendations to the Cultural Affairs Committee on improving the means of increasing the mobility of collections*, June 2010, and related documents<sup>344</sup>, EU Member States should greatly improve cooperation regarding the exchange of information, knowledge and experiences in the prevention of theft and the fight against illicit trafficking of cultural goods.

245. [CONTENT:] States should consider taking all necessary measures (including bilateral or multilateral arrangements or agreements) in order to enhance and, where necessary, establish direct channels of communications between their competent authorities, agencies and services, so as to facilitate the secure and rapid exchange of information concerning all aspects of offences against cultural property. States should also consider taking necessary measures in order to allow their national competent authorities, even without a prior request from the interested State or its authorities, to transmit information

<sup>337</sup> Council of Europe, *European Treaty Series*, No. 143.

<sup>338</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>339</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>340</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>341</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>342</sup> See UNODC/CCPCJ/EG1/2009/2.

<sup>343</sup> See CTOC/COP/2010/17.

<sup>344</sup> See [http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities\\_en.htm](http://ec.europa.eu/culture/our-policy-development/working-group-on-museum-activities_en.htm)

relating to offences against cultural property to a competent authority of another State, where they believe that such information can assist that authority in undertaking or successfully concluding investigations and criminal proceedings, or can lead to the recovery of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property. Finally, States should consider taking all necessary measures to improve the international exchange of information on trends in crimes against cultural property, as well as on circumstances, means and methods, technologies, persons and organizations involved in such offences.

**GUIDELINE 53. States should consider cooperating in international data collection through the UNODC Crime Trend Survey.**

➔ *See also Guideline 3.*

246. [RATIONALE:] An improvement in the worldwide collection and comparison of official statistical data on offences against cultural property could have some positive feedbacks. It could greatly enhance the knowledge of the phenomenon of trafficking in cultural property and related offences, and especially of trends in reporting and discovery, as well as in prosecution, sentencing, recovery of the assets, number and characteristics of people reported, arrested, prosecuted and sentenced, typology and extent of sanctions imposed. This, in turn, could help international organizations, as well as national legislators, in planning and implementing more effective criminal policies to combat crimes against cultural property. It could also help in testing the efficacy and effectiveness of already existing laws and regulations, thereby indirectly contributing to improve prevention of offences against cultural property and protection of cultural heritage.

[BACKGROUND:] In 2009, the United Nations Office on Drugs and Crimes included a module on trafficking in cultural property in the Eleventh Crime Trend Survey, on a pilot basis. The module covered police and court statistics on a number of crimes, including trafficking (defined by the Survey as import, export or transport) of cultural property, theft of cultural property, possession/handling of cultural property and unlawful excavation of cultural property. National police were asked to provide information on the number of recorded offences and persons suspected of, arrested for or accused of those crimes. Courts were also asked to provide information on the number of persons tried and convicted for those crimes. Only 24 States entered data in the module on trafficking in cultural property. Responding States were more frequently able to provide police data (20 responses) than court data (12 responses). Only five States provided data on the number of offences involving unlawful excavation of cultural property<sup>345</sup>.

247. [CONTENT:] States should consider taking all necessary measures in order to collect regularly, and at least on annual basis, the aforementioned data, so as to have comparable statistical series available (data should be disaggregated as much as possible). States should endeavour to transmit such data to the United Nations Office on Drugs and Crimes receipt of the periodical requests for data for the Crime Trend Survey.

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<sup>345</sup> See E/CN.15/2010/4. See also E/CN.15/2010/17.

## Section VI. Return, restitution and repatriation

**GUIDELINE 54.** *States should consider undertaking all necessary measures to recover trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property for the purpose of return, restitution and repatriation,*

→ See also Guideline 46.

248. [RATIONALE:] The return, restitution and repatriation of trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property is the ultimate aim of any measure – either legislative or regulatory, administrative, investigative or judicial – intended to combat trafficking in cultural property and related offences and ensure the reintegration as far as possible, of cultural heritage harmed by such offences.

[BACKGROUND:] The recovery and restitution of stolen, looted or illicitly exported cultural properties is a central issue in many international conventions and other relevant documents. For example:

a. the *Convention on Stolen or Illegally Exported Cultural Objects*<sup>346</sup> is entirely dedicated to regulating the restitution of stolen cultural properties and the return of illicitly exported ones;

b. the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*<sup>347</sup> (articles 7 and 13) provides for States Parties “at the request of the State Party of origin, to take appropriate steps to recover and return” cultural properties stolen or illicitly imported after the entry into force of the same Convention, as well as to “ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner”, and to “admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners”;

c. at regional level, the *European Convention on Offences relating to Cultural Property*<sup>348</sup> (articles 6 to 11) binds States Parties “to cooperate with a view to the restitution of cultural property found on their territory, which has been removed from the territory of another Party subsequent to an offence relating to cultural property committed in the territory of a Party” and includes several detailed provisions for return of stolen or illicitly exported cultural property;

d. at regional level, the *Council Directive 93/7/EEC* of 15 March 1993 on *The return of cultural objects unlawfully removed from the territory of a Member State* is entirely dedicated to regulating the procedure and circumstances of the return of cultural objects which have been unlawfully removed from the territory of a Member State;

e. more generally, the *UN Convention against Transnational Organized Crime*<sup>349</sup> (article 14 and article 25), which can be applied in relation to offences against cultural property which are transnational in nature, involve an organized criminal group and constitute “serious crimes” according to article 2, provides for States Parties to “give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners”, as well as to “establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by” the same convention;

f. also the *Convention against Corruption*<sup>350</sup> (article 51 and article 57), which may be applied in relation to laundering of proceeds of crimes against cultural property and corruption, that is often instrumental to trafficking in cultural property and related offences, includes similar provisions;

<sup>346</sup> United Nations, *Treaty Series*, vol. 2421, No. 43718.

<sup>347</sup> United Nations, *Treaty Series*, vol. 823, No. 11806.

<sup>348</sup> Council of Europe, *European Treaty Series*, No. 119.

<sup>349</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.

<sup>350</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

g. the *Model Treaty for the prevention of crimes that infringe on the cultural heritage of peoples in the form of movable property*<sup>351</sup> (article 4) indicates the use of diplomatic channels as the ordinary procedure for requests for recovery and return of stolen or illicitly exported cultural property;

h. the UNODC Expert group *on protection against trafficking in cultural property* expressly recommended that “States should consider including, in their cooperation agreements on protection against trafficking in cultural property, specific provisions for [...] the return or, as appropriate, the restitution of stolen cultural property to its rightful owner”<sup>352</sup>.

249. [CONTENT:] States should consider acceding to (where they are not yet parties) and/or implementing the aforementioned international conventions, and concluding any further bilateral or multilateral agreements or arrangements in order to grant, in the framework of criminal proceedings, the return or restitution of a trafficked, illicitly exported or imported, stolen, looted or illicitly excavated, illicitly dealt in or missing cultural property to its rightful owner with the greatest effectiveness and within the shortest possible time. The requesting State should furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return.

250. States should also consider taking all necessary measures to ensure that their domestic legislation conforms to the aforementioned purpose. In particular, States should consider providing for exemption of customs duties or other charges upon cultural property returned to the requesting State.

251. States should provide for the payment of just compensation to any innocent purchaser or to any person who has valid title to the cultural property which has to be returned.

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<sup>351</sup> *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August-7 September 1990: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. B.1, annex.

<sup>352</sup> See UNODC/CCPCJ/EG1/2009/2.

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